Supreme Court, U.S.
FILED
MAY 1 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-6621

GILBERT FRANKLIN BECK, Petitioner,

v.

STATE OF ALABAMA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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-v.-

STATE OF ALABAMA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Gilbert Franklin Beck, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Alabama without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53. Counsel has not yet received an affidavit from the petitioner, who is in the custody of the State of Alabama under sentence of death at the William C. Holman Unit of Alabama's state prison system at Atmore, Alabama. Mr. Beck's affidavit in support of this motion will be forwarded to this Court immediately upon receipt.

David Klingsberg
KAYE,SCHOLER, FIERMAN, HAYS
& HANDLER
425 Park Avenue
New York, New York 10022
(212) 759-8400

Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

GILBERT FRANKLIN BECK, :

Petitioner, :

-v- :

STATE OF ALABAMA, : AFFIDAVIT

Respondent. :

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

DAVID KLINGSBERG, being duly sworn, states:

1. I am counsel to Gilbert Franklin Beck in Beck v. Alabama, now pending in this Court on petition for writ of certiorari, and I make this affidavit in support of Mr. Beck's motion for leave to proceed in forma pauperis. My representation of Mr. Beck is without remuneration.

2. Mr. Beck is presently in the custody of the State of Alabama under sentence of death and is not immediatately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Beck by me and will be forwarded to this Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Beck is attached hereto.

3. Petitioner had counsel appointed to represent him at his trial and on his appeal.

4. I am informed and believe that because of his poverty, Mr. Beck is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Beck is entitled to redress in this cause for the reason that his conviction and sentence of death were obtained in violation of his rights under the Eighth and Fourteenth Amendments to the Constitution of the United States.

David Klingsberg
DAVID KLINGSBERG

Sworn to before me this
30th day of April, 1979.

Rhoda Ginsberg
NOTARY PUBLIC

My commission expires:

RHODA GINSBERG
Notary Public, State of New York
No. 31-1440080
Qualified in New York County
Commission Expires March 30, 1981

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No.

GILBERT FRANKLIN BECK, :
Petitioner, :
-v- :
STATE OF ALABAMA, :
Respondent. :

I, Gilbert Franklin Beck, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration on my present appeal.

5. I believe that I am entitled to the redress I seek in said cause.

6. The nature of said cause is briefly stated as follows: I was convicted in the Circuit Court of Etowah County, a trial court of the State of Alabama of robbery-intentional killing and was sentenced to death. I am being held under sentence of death at the William C. Holman Unit of the Alabama prison system at Atmore, Alabama. My conviction and sentence for robbery-intentional killing were affirmed by the Supreme

Court of the State of Alabama on December 8, 1978, I believe that errors were committed during the course of my trial in violation of my constitutional rights and that the death sentence was imposed upon me in violation of my constitutional rights.

GILBERT FRANKLIN BECK

STATE OF ALABAMA

COUNTY OF

The foregoing affidavit of Gilbert Franklin Beck was subscribed and sworn to before me this day of , 1979.

NOTARY PUBLIC

My commission expires:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

GILBERT FRANKLIN BECK,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

Petitioner Gilbert Franklin Beck prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama affirming his conviction and sentence of death. The judgment of the Supreme Court of Alabama was entered on December 8, 1978.

Opinions Below

The opinion of the Supreme Court of Alabama, reported at 365 So.2d 1006 (Ala. 1978) and including dissents by two Justices, is attached as Appendix A. The Alabama Supreme Court affirmed an opinion of the Court of Criminal Appeals of Alabama, reported at 365 So.2d 985 (Ala. Crim. App. 1978) and attached as Appendix B.

Jurisdiction

The judgment and opinion of the Supreme Court of Alabama was entered on December 8, 1978. On January 8, 1979, the Supreme Court of Alabama entered an order setting March 30, 1979 as the date for petitioner's electrocution. On February 26, 1979, this

Court, per Mr. Justice Powell, granted petitioner's motion for an extension of time to May 1, 1979 within which to file this petition for a writ of certiorari.[1] This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1257(3).

Questions Presented

The Alabama death penalty statute, § 13-11-1 et seq., Alabama Code (1975), under which petitioner and more than 35 other prisoners have been convicted of capital crimes and sentenced to death, raises important constitutional questions:

1. WHETHER ALABAMA'S REFUSAL TO ALLOW THE JURY TO FIND A CAPITAL DEFENDANT GUILTY OF A LESSER INCLUDED OFFENSE VIOLATES RIGHTS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

Unlike any other death penalty statute in the United States, Alabama's law precludes juries from considering whether defendants charged with capital offenses are guilty of a lesser included offense. In Keeble v. United States, 412 U.S. 205, 213 (1973), a non-capital case, this Court held that any statute which foreclosed juries from receiving a lesser-offense instruction "would raise difficult constitutional questions." See also Gregg v. Georgia, 428 U.S. 153, 199-200, n.50 (1976). By forcing capital juries to make an all-or-nothing choice on the issue of guilt, Alabama's death penalty statute has produced startling results. Of the first 50 defendants who pleaded not guilty and were tried under the law, 48 were convicted; of the first 45 sentenced after

1 A copy of Mr. Justice Powell's order is attached as Appendix C. On March 21, 1979, the Supreme Court of Alabama issued an order staying petitioner's execution until further order of that Court.

trial, 37 received death sentences.[2] Since Alabama continues to permit lesser-offense instructions in non-capital cases, its death penalty statute raises the question whether capital defendants may be singled out for deprivation of an important procedural safeguard.

2. WHETHER ALABAMA'S REQUIREMENT IN CAPITAL CASES THAT THE JURY "SHALL" SENTENCE DEFENDANTS TO DEATH UPON A VERDICT OF GUILTY WITHOUT CONSIDERATION OF MITIGATING CIRCUMSTANCES VIOLATES PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE AND UNDER THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT.

This provision of Alabama's law presents for this Court's determination (a) whether the principles set forth in Woodson v. North Carolina, 428 U.S. 280 (1978), forbid a mandatory death sentence by a trial jury, which must affect materially the subsequent review of the jury's sentence by the trial judge, and (b) the question reserved in this Court's decision in Lockett v. Ohio, 98 S.Ct. 2954, 2967, n.16 (1978), whether the Constitution requires that the jury, rather than the judge alone, have an opportunity for consideration of mitigating circumstances which this Court also held in Woodson is virtually always an essential prerequisite of a constitutional death sentence.

3. WHETHER ALABAMA'S DEATH PENALTY STATUTE VIOLATES THE DUE PROCESS CLAUSE BY POSTPONING CONSIDERATION OF SENTENCE BY THE TRIAL JUDGE UNTIL THE JURY HAS MANDATORILY MADE AN INITIAL DETERMINATION THAT THE DEATH PENALTY "SHALL" BE IMPOSED.

This provision of Alabama's law places the trial judge's sentencing determination under the cloud of the jury's initial

2 Respondent's Brief in Opposition to a Petition for a Writ of Certiorari, Jacobs v. Alabama (U.S., October Term 1978, No. 78-5696), at 10, 35.

mandatory death sentence and thus raises the question whether it is consistent with this Court's holding that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977).

4. WHETHER ALABAMA'S DEATH PENALTY STATUTE IS SO VAGUE AND HAS BEEN APPLIED SO INCONSISTENTLY THAT IT VIOLATES PETITIONER'S RIGHTS TO REASONABLE NOTICE UNDER THE DUE PROCESS CLAUSE AND INFRINGES ON HIS RIGHT UNDER THE EIGHTH AMENDMENT NOT TO HAVE THE DEATH PENALTY IMPOSED IN AN ARBITRARY, WANTON, UNRELIABLE OR DISCRIMINATORY MANNER.

One of the aggravating circumstances specified in Alabama's law for consideration by the trial judge -- whether the offense was "especially heinous, atrocious, or cruel" -- is vague on its face, has been inconsistently applied, and raises the question of whether and to what extent the void-for-vagueness doctrine should be invoked with respect to sentencing provisions in a capital punishment statute.

5. WHETHER THE OVERALL OPERATION OF ALABAMA'S DEATH PENALTY STATUTE ENCOURAGES SUCH UNRELIABLE FINDINGS ON THE ISSUES OF GUILT AND SENTENCE AND IS SO FUNDAMENTALLY UNFAIR THAT IT VIOLATES PETITIONER'S RIGHTS UNDER THE DUE PROCESS AND CRUEL AND UNUSUAL PUNISHMENT CLAUSES.

By stripping petitioner of vital procedural safeguards at each stage of the capital punishment proceeding, Alabama's death penalty statute has "stacked the deck" against petitioner in violation of this Court's ruling in Witherspoon v. Illinois, 391 U.S. 510, 522, n.22, 523 (1968), that the capital punishment decision cannot be made on "scales . . . deliberately tipped toward death."

* * *

Relevant Constitutional and Statutory Provisions

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case involves the following provisions of Alabama law: Section 13-11-1 through Section 13-11-9, Code of Alabama (1975); Section 15-17-1, Code of Alabama (1975). These statutes are set forth as Appendix D to this petition.

Statement of the Case

Petitioner was indicted by an Etowah County (Ala.) grand jury on charges of committing a robbery on November 8, 1976, during the course of which he was alleged to have intentionally killed Mr. Roy Malone, the victim of the robbery.[3] Other than petitioner, there were no eyewitnesses who testified at the trial as to the actual killing of Mr. Malone. According to the opinion of the Court of Criminal Appeals below, petitioner, who took the stand in his own defense, admitted that he went with an accomplice to Mr. Malone's house that day in order to rob him of a large sum of cash.[4] Petitioner testified that he never contemplated that any physical injury would be inflicted on Mr. Malone (Tr. 588). He denied killing Mr. Malone (Tr. 594). According to petitioner, it was his accomplice, Mr. Roy Clements, who unexpectedly killed Mr. Malone by knifing him (Tr. 592). Petitioner denied that he carried a knife and insisted that he protested Clements' knife assault on Mr. Malone as soon as it occurred (Tr. 592, 594). Petitioner said that he did not remove anything from Mr. Malone's

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3 Petitioner was indicted under § 13-11-2(a)(2) of the Alabama death penalty statute, which specifies the following capital offense: "Robbery or attempts thereof when the victim is intentionally killed by the defendant."

4 Beck v. State, 365 So.2d 985, 995 (Ala. Crim. App. 1978).

house (Tr. 593). A few hours after the robbery, petitioner was arrested by local police authorities and has been incarcerated ever since.

Although petitioner's accomplice, Clements, was separately indicted, convicted, and sentenced to death for robbery-intentional killing, his conviction has been reversed by the Supreme Court of Alabama on state-law grounds.[5]

The Trial Court's Instruction to the Jury

The trial judge's charge did not permit the jury to convict petitioner on the lesser included offense of robbery.[6] Under Alabama's statute, the trial judge's charge gave the jurors only two alternatives: voting either for acquittal or for conviction of the capital crime of robbery and intentional killing (Tr. 743, 746).

The trial judge also charged that if petitioner "is acquitted in this case he can never be tried for anything he ever did to Roy Malone" (Tr. 743).

By virtue of this novel charge, the jury not only was foreclosed from finding petitioner guilty of any crime other than robbery-intentional killing, but was also informed that if it acquitted petitioner, no subsequent charge could be brought on

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5 Ex parte Roy Frank Clements (Ala. Supr. Ct., No. 77-643, 1978), unreported.

6 Nor did the trial judge give a lesser offense instruction which would have allowed the jury to find petitioner guilty of the crime of conspirary, a non-capital offense (Alabama Code § 13-9-20 (1975). Instead, even though the list of crimes in the Alabama death penalty law does not include conspiracy, the judge instructed the jury that petitioner could be convicted of the capital crime charged in the indictment even if the jury found that he was merely a conspirator. Petitioner's counsel's objection to this instruction (Tr. 748) was overruled (Tr. 750).

a lesser offense such as robbery. Under the judge's instruction, the jury was pressured to find petitioner guilty of a capital offense even if it really believed he was guilty only of robbery or some other lesser offense.

On the issue of sentence, the trial judge instructed the jury that its deliberations were to be governed by § 13-11-2(a) of the Alabama death penalty statute, which the court paraphrased as follows: "If the jury finds the Defendant guilty they shall fix the punishment of death . . . " (Tr. 742). Stressing the mandatory nature of the jury's sentencing determination upon a finding of guilt, the court stated:

> "If after you have considered all the testimony, all the evidence in the case and all proper and reasonable inferences therefrom you are satisfied beyond a reasonable doubt the Defendant was guilty of the robbery and the willful killing of Roy Malone, then the form of your verdict shall be, 'We, the jury, find the Defendant, Gilbert Franklin Beck, guilty of robbery with aggravated circumstances where Roy Malone was intentionally killed as charged in the indictment and we fix the punishment at death." (Tr. 746-47; emphasis added).

Following the jury's guilty verdict and sentence of death (Tr. 758), the trial judge scheduled a hearing to consider aggravating and mitigating circumstances and to decide whether to accept the death sentence as fixed by the jury (Tr. 758).

At the subsequent hearing before the judge, the trial judge rejected petitioner's motion to empanel a jury to consider aggravating and mitigating circumstances (Tr. 761-62). Petitioner reiterated his earlier testimony that he was not involved in Mr. Malone's death and had no idea that the victim might be killed (Tr. 779).

Following oral argument, the trial judge found aggravating circumstances pursuant to the Alabama death penalty law, in-

cluding the following corresponding to § 13-11-6(8) of Alabama's law: "The capital felony was especially heinous, atrocious, or cruel" (Tr. 813). The trial judge also stated at this point that "two or more human beings [were] intentionally killed by the defendant by one or a series of acts" (Tr. 813). This statement is inexplicable, since petitioner was tried only for the murder of Mr. Malone and no evidence was introduced implicating him in any other death. Nor did the trial judge provide any other reasons why petitioner's situation differed from other robbery-intentional killings, even though the statute's use of the word "especially" necessitates such an explanation.

After listing the aggravating circumstances, the trial judge found a single mitigating circumstance under § 13-11-7(1) of the law: "the Defendant has no significant history of prior criminal activities" (Tr. 813).

The trial judge gave no weight to testimony concerning petitioner's exemplary employment history, to the fact that he had served honorably in the U.S. Marines (Tr. 775), to the fact that petitioner's requests to take a lie-detector test had been refused (Tr. 781), or to testimony concerning petitioner's psychological difficulties (Tr. 782, 798-800).

The trial judge made no written findings, did not make any attempt to weigh the aggravating and mitigating circumstances, and simply confirmed the jury's death sentence after perfunctorily listing aggravating and mitigating circumstances by repeating or paraphrasing the statutory language (Tr. 812-13). Petitioner's unsuccessful appeals to the Alabama Court of Criminal Appeals and to the Alabama Supreme Court followed.

How the Federal Questions Were Raised and Decided Below

Petitioner's contention that Alabama's procedures for

trial and sentence in capital felony cases violate the United States Constitution were raised before trial in a motion to quash the indictment (Tr. 39-45), which the trial judge denied (Tr. 105). Petitioner's counsel also objected to the trial judge's refusal to permit a jury to consider aggravating and mitigating circumstances relevant to the issue of sentence (Tr. 761-62). Petitioner pressed these constitutional objections and other objections based on state-law grounds before the Alabama Court of Criminal Appeals, which rejected them on the merits in a lengthy opinion (Appendix B), and in his petition to the Alabama Supreme Court, which affirmed the Court of Criminal Appeals in a 1-page opinion (Appendix A) and rejected petitioner's federal constitutional arguments on the authority of a prior decision.[7]

* * *

Reasons for Granting the Writ

I.

ALABAMA'S PRECLUSION OF A LESSER INCLUDED OFFENSE INSTRUCTION IN CAPITAL CASES VIOLATES PETITIONER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS

This case squarely presents the "difficult constitutional questions" which this Court in Keeble v. United States, 412 U.S. 205, 213 (1973), stated are raised by statutory preclusion of an instruction that a jury may find a defendant guilty of a lesser included offense. These constitutional questions are even more serious where, unlike Keeble (a non-capital case), the statute gives the jury the alternatives of finding the defen-

7 Jacobs v. State, 361 So.2d 640 (Ala. 1978), cert. denied, 99 S.Ct. 1034 (1979).

dant guilty of a capital offense, leading to a death sentence, or allowing him to be fully exonerated where there is strong evidence that he is guilty of a serious -- but non-capital -- offense.

Keeble, which held that the federal Major Crimes Act could not be construed to preclude a lesser-offense instruction, summarized the vital protection afforded by such an instruction as follows:

> "True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." 412 U.S. at 212-13 (emphasis in original and added).

Similarly, the plurality opinion in Gregg v. Georgia, supra, held that a criminal justice system which, among other things, precluded lesser-offense instructions "would be totally alien to our notions of criminal justice" and "would be unconstitutional." 428 U.S. at 199-200, n.50. In rejecting the argument that availability of a lesser-offense instruction provided capital juries with too much discretion to satisfy the concerns set forth in Furman v. Georgia, 408 U.S. 238 (1972), the Court in Gregg eliminated any doubt as to the constitutional importance of preserving a capital defendant's right to such an instruction.

Petitioner's rights at trial to fair jury fact-finding on the issue of guilt were severely undermined by the unavailability of a lesser-offense instruction. Under Alabama law applicable in non-capital cases, there is no question that he would

have been entitled to such an instruction.[8] Under Alabama's death penalty statute, which prohibits such instructions,[9] the jury was given an all-or-nothing choice on the question of petitioner's guilt. The prejudice which petitioner thereby suffered was compounded by the trial judge's instruction that in the event of acquittal, petitioner "can never be tried for anything that he ever did to Roy Malone" [the decedent-victim] (Tr. 743; emphasis added).

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8 E.g., Fulghum v. State, 272 So.2d 886, 890 (Ala. Supr. Ct. 1973) ("A defendant who is accused of the greater offense is entitled to have the court charge on the lesser offenses included in the indictment, if there is any reasonable theory from the evidence which would support the position"); see also Alabama Code, § 15-17-1 ("When an indictment charges an offense of which there are different degrees, the jury may find the defendant not guilty of the degree charged and guilty any degree inferior thereto or of an attempt to commit the offense charged; and the defendant may also be found guilty of any offense which is necessarily included in that with which he is charged, whether it be a felony of misdemeanor"). Since petitioner testified that he did not kill the decedent, never contemplated that his accomplice might do so, and protested against his accomplice's fatal knife assault on the decedent, he clearly satisfied the Alabama rule applicable in all non-capital cases and, at the very least, would have been entitled to an instruction on the lesser offense of robbery. The federal rule for lesser-offense instructions is summarized in Keeble v. United States, 412 U.S. 205, 208 (1973) ("the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater").

9 Alabama Code § 13-11-2(a) (1975): "If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses . . ." (emphasis added). See also Chief Justice Torbert's concurring and dissenting opinion in Jacobs v. State, 361 So.2d 640, 646 (Ala. 1979), cert. denied, 99 S.Ct. 1034 (1979) ("the capital jury in Alabama cannot convict a defendant for a lesser included offense").

A. Due Process

The statute's preclusion of lesser-offense instructions jeopardizes the fundamental fairness of capital trials in Alabama. It necessarily undermines a capital defendant's presumption of innocence and dilutes the requirement that he be found guilty beyond a reasonable doubt. By precluding a finding of guilt on an intermediate offense, the Alabama law and the trial judge's instruction in this case placed an intolerable strain on the jury's ability to make a fair finding on the issue of guilt or innocence in a capital case.

This Court has ruled consistently that the due process clause necessitates stringent safeguards in criminal cases to minimize the margin for erroneous convictions. Thus, in In re Winship, 397 U.S. 358 (1970), the Court held that the beyond-reasonable-doubt standard itself was constitutionally required lest there be "doubt whether innocent men are being condemned" and in order to establish "confidence" that a jury's finding of guilt has been made with "utmost certainty." Id at 364. See also Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

The considerations set forth in Winship underscore the need for lesser-offense instructions in capital cases, particularly where, as here, there is strong evidence that the defendant is guilty of a serious lesser crime. Keeble expressly recognized the "substantial risk" that foreclosure of a lesser-offense instruction may induce fact-finding error on the part of even the most conscientious jurors. Moreover, without such an instruction, the prospect of acquittal is likely to be so repulsive that conviction on the offense charged may seem the only alternative even where, as in this case, there is a serious question as to

the defendant's guilt on the greater charge.[10]

Since Winship, this Court has sharply scrutinized federal and state criminal procedures to ensure that defendants' presumption of innocence is not impaired and the risk of conviction increased by impermissible influences on jurors' judgment. E.g., Cool v. United States, 409 U.S. 100 (1972) (per curiam) (due process violated by instruction that accomplice's testimony in favor of defendant should not even be "considered" unless the jury first believed it beyond a reasonable doubt); Mullaney v. Wilbur, 421 U.S. 684 (1975); Estelle v. Williams, 425 U.S. 501 (1976).

Alabama's absolute rule[11] against consideration of a

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10 The lower courts have also recognized that foreclosure of a lesser-offense instruction, where otherwise appropriate, jeopardizes defendants' fundamental rights to fair jury fact-finding. E.g., Joe v. United States, 510 F.2d 1038, 1042 (10th Cir. 1975) (holding Keeble should be applied retroactively in § 2255 collateral proceeding because deprivation of a lesser-offense instruction "affected a right which Keeble recognized as fundamental against the background of the Due Process Clause"); United States v. Comer, 421 F.2d 1149, 1153-1154 (D.C. Cir. 1970) (reversing conviction for failure to give lesser-offense instruction on the ground that such an instruction would ensure that the jury would not return a verdict "in disregard to the proof"); United States v. Tsanas, 572 F.2d 340, 346 (2d Cir. 1978), cert. denied, 98 S.Ct. 1647 (1978) ("the court should give the form of [lesser-offense] instruction which the defendant seasonably elects. It is his liberty that is at stake, and the worst that can happen to the Government under less rigorous instruction is his readier conviction for a lesser rather than greater crime"); United States ex rel. Powell v. Pennsylvania, 294 F. Supp. 849, 852 (E.D. Pa. 1968) (failure to give lesser-offense instruction, where otherwise appropriate, constitutes fundamental error requiring federal habeas corpus relief). Accord: United States ex rel. Matthews v. Johnson, 503 F.2d 339 (3d Cir. 1974).

11 The Alabama rule is in effect an irrebutable presumption against a finding of guilt on a lesser included offense. This Court has frequently invalidated irrebutable factual presumptions in cases involving fundamental rights. E.g., Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1973); Leary v. United States, 395 U.S. 6 (1969); Carrington v. Rash, 380 U.S. 89 (1965).

lesser-offense finding jeopardizes capital defendants' rights at least as much as the practices invalidated in the post-Winship line of cases, none of which involved a capital offense. By coercing the jury to choose among extremes, Alabama's law erects an "artificial barrier" to fair fact-finding on the issue of guilt. Cool v. United States, supra, 409 U.S. at 104. Particularly where a man's life is in the balance, this barrier is constitutionally impermissible. Gregg v. Georgia, supra, 428 U.S. at 187 ("when a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed"); Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring) ("I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirement of the Constitution in a capital case"). See also Woodson v. North Carolina, supra, 428 U.S. at 305 (because of the qualitative difference between capital and non-capital cases, there is "a corresponding difference in the need for reliability on the determination that death is the appropriate punishment in a specific case").

Since Alabama's decision to preclude lesser-offense instructions in capital cases, startling results have been achieved. During the first 33 months of the law's operation, Alabama prosecutors attained a 96% conviction rate in capital cases where the defendant pleaded not guilty and an 82% death sentence rate where the jury rendered a verdict of guilty.[12] Compare Woodson v. North Carolina, supra, 428 U.S. at 295 n.31

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12 Indeed, this feature of Alabama's law so plainly subverts the principles established by this Court in Winship, Mullaney, Estelle, Cool, Gregg and Keeble that a per curiam reversal of petitioner's conviction and sentence, as in Cool, would be appropriate.

("Data compiled on discretionary jury sentencing of persons convicted of capital murder reveal that the penalty of death is generally imposed in less than 20% of the cases"). This fact underscores the need for this Court to review Alabama's decision to preclude lesser-offense instructions in capital cases.

B. Equal Protection

Alabama's law also raises a serious question under the equal protection clause. Since non-capital defendants in Alabama continue to have the safeguard of a lesser-offense instruction, the law singles out capital defendants and thereby burdens their fundamental right, recognized in Winship and Keeble, to unprejudiced jury fact-finding on the issue of guilt.

Because of its discriminatory impact on this fundamental right, the statute must be strictly scrutinized to determine whether it is "necessary to promote a compelling governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634 (1969). See also Zablocki v. Redhail, 434 U.S. 374, 388 (1978); Dunn v. Blumstein, 405 U.S. 330, 338-43 (1972); Lindsey v. Normet, 405 U.S. 56, 73 (1972). Alabama's statute cannot withstand scrutiny under this standard.

The only interest that Alabama has asserted in support of the statute's preclusion of lesser-offense instructions in capital cases is the need to comply with this Court's ruling in Furman by controlling undue jury discretion and nullification in capital cases.[13] This objective is insufficient to sustain the law. Gregg and its companion cases squarely held that the concerns expressed in Furman for consistently-applied capital senten-

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13 See Respondent's Brief in Opposition to Petition for Writ of Certiorari, Jacobs v. Alabama, n.2, supra, at 24.

cing could be satisfied by capital punishment statutes which permit juries to receive lesser-offense instructions on the issue of guilt.[14] The Gregg plurality opinion of Justices Stewart, Powell and Stevens stated that elimination of lesser-offense instructions would be "totally alien to our notions of criminal justice," 428 U.S. at 199-200, n.50. Thus, as demonstrated by the Georgia, Florida and Texas statutes upheld by this Court, there is no need to interfere with the jury's guilt-finding process in order to comply with Furman. Those states' laws establish that there is a less restrictive means available to meet Alabama's objective of having a capital sentencing structure that is consistent with the Constitution.[15]

In sum, it would be inconsistent with this Court's rulings in Gregg, Proffitt and Jurek to conclude that Alabama's law is "necessary" to promote the objective of consistent capital sentencing. Nor is the preclusion of lesser-offense instructions the least burdensome means of promoting those goals. Accordingly, under established precedents of this Court, there is a serious question as to whether the statute violates the equal protection clause.[16]

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14 See Gregg v. Georgia, supra, 428 U.S. at 163, 199; Proffitt v. Florida, 428 U.S. 242, 254 (1976); Jurek v. Texas, 428 U.S., 262, 274 (1976).

15 See Respondent's Brief in Opposition to Petition for Writ of Certiorari, Jacobs v. Alabama, n.2, supra, at 24.

16 E.g., Dunn v. Blumstein, supra, 405 U.S. at 343 ("Statutes affecting constitutional rights must be drawn with 'precision' . . . and must be 'tailored' to serve their legitimate objectives . . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protested activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means' . . . ."") (citations omitted); Zablocki v. Redhail, supra.

* * *

In the last analysis, Alabama's decision to abolish lesser-offense instructions in capital cases constitutes a serious misreading of Furman and deprived petitioner of a fair trial.[17]

II.

ALABAMA'S REQUIREMENT THAT JURIES MUST IMPOSE A DEATH SENTENCE WITHOUT CONSIDERATION OF MITIGATING CIRCUMSTANCES VIOLATES THE DUE PROCESS CLAUSE AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE

Unlike any death penalty statute previously upheld by this Court, Alabama's death penalty law specifically precludes the jury from considering aggravating or mitigating circumstances relevant to the issue of whether the death penalty should be imposed. Once the jury makes a finding of guilt, the statute requires that "it shall fix the punishment at death." (§ 13-11-2(a).)[18] Aggravating or mitigating circumstances are considered only by the trial judge at a subsequent hearing at which he de-

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17 Alabama's approach to the question of lesser-offense instructions is also unconstitutional under the "cruel and unusual punishment" clause of the Eighth Amendment. The Eighth Amendment applies not merely to the sentencing process, but also to the guilt-finding process. Robinson v. California, 370 U.S. 660 (1962). Because of its uniqueness, its severe prejudice to capital defendants' rights to accurate jury fact-finding, and its startling effects in practice, Alabama's decision to preclude lesser-offense instructions fails to reflect "contemporary community values" and "evolving standards of decency," as the Eighth Amendment requires. E.g., Woodson v. North Carolina, supra, 428 U.S. at 295, 301. Indeed, this case provides even more compelling grounds for this Court's intervention than Woodson, which involved a statute which was not at all unique to North Carolina. Woodson v. North Carolina, supra, 428 U.S. at 297.

18 This provision was read to the jury at petitioner's trial (Tr. 742-743) and has been described by Alabama authorities as follows: "it requires the jury to phrase a guilty verdict in terms of the punishment of death." Respondent's Brief in Opposition to Petition for Writ of Certiorari, Jacobs v. Alabama, n.2, supra, at 11.

cides whether to "refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole." § 13-11-4.

These provisions raise serious constitutional questions which this Court has yet to decide.

First, by failing to permit the jury to consider aggravating and mitigating circumstances before imposing sentence, the Alabama law is contrary to this Court's pronouncements on the vital role of the jury in the death-sentencing process. Thus, in Witherspoon, the Court stressed that juries "express the conscience of the community on the ultimate question of life or death" and must not be "organized to return a verdict of death" (391 U.S. at 519, 521). See also Irvin v. Dowd, 366 U.S. 717, 722 (1961) ("In the ultimate analysis only the jury can strip a man of his liberty or his life").

Under this line of cases, Alabama's law raises a serious constitutional question because it does not allow the jury to "express the conscience of the community" in the light of evidence of aggravating or mitigating circumstances relevant to the life-death determination. Rather, Alabama's law strips defendants of the vital constitutional safeguard afforded by the jury's "common-sense judgment"[19] and its capacity to "maintain a link between contemporary community values and the penal system." Woodson v. North Carolina, supra, 428 U.S. at 295.

Alabama's requirement that juries "shall" impose a death sentence upon a finding of guilt is also at odds with the premises which underlie the Woodson ruling. Woodson stressed that jurors have an "aversion . . . to mandatory death penalty

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19 Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

statutes [that is] shared by society at large." 428 U.S. at 295. Woodson also stated that "under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers." 428 U.S. at 296. Woodson's holding that it was unconstitutional to eliminate any chance for this societal outlook to be expressed in the sentencing process applies equally to Alabama's jury sentence provision.

Granting Alabama trial judges power to reverse the jury's initial mandatory sentence does not remedy this defect any more adequately than appellate review of sentence would have saved the statutes invalidated in Woodson and Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976). In either situation, input of "contemporary community values" at the grass-roots level is impermissibly curtailed.

It is true that in Proffitt v. Florida, 428 U.S. 242, 252 (1976), this Court stated that "it has never suggested that jury sentencing is constitutionally required." 428 U.S. at 252. But Alabama's provision for jury sentencing is radically different from the Florida law upheld in Proffitt. The Proffitt ruling was based on the premise that Florida juries play an important role in sentencing by considering the same aggravating and mitigating circumstances as the judge, and by making an advisory recommendation to the judge. 428 U.S. at 248. Alabama's law gives no such role to the jury, but instead injects the jury into the sentencing process without allowing it to consider mitigating and aggravating circumstances contrary to this Court's rulings in Woodson and Roberts.

Second, even if one assumes that there is no need for jury participation in capital sentencing, Alabama's law raises the question whether, in the event a state opts for jury partici-

pation, it can foreclose the jury from consideration of mitigating and aggravating circumstances. This issue has never been decided by this Court.

An Alabama capital jury's mandatory sentence is a meaningful and significant part of the sentencing procedure. It must necessarily affect the trial judge's subsequent sentencing determination. See Point III, infra. In view of the fact that Alabama's trial judges affirmed juries' mandatory death sentences in 37 of the first 45 cases after Alabama's law went into effect, there is solid reason to believe that the law has none of the benefits of judge-imposed sentencing noted in Proffitt, 428 U.S. at 252-53, and contains many of the defects of mandatory sentencing invalidated in Woodson.

This case squarely presents the question which this Court reserved in Lockett, namely, what role, if any, the jury may play in capital sentencing. 98 S.Ct. at 2967, n.16.

III.

ALABAMA'S DEATH PENALTY STATUTE VIOLATES THE DUE PROCESS CLAUSE BECAUSE IT POSTPONES CONSIDERATION OF SENTENCE UNTIL THE JURY HAS MANDATORILY MADE AN INITIAL DETERMINATION THAT THE DEATH SENTENCE "SHALL" BE IMPOSED

By postponing the trial judge's consideration of aggravating and mitigating circumstances until after the jury has imposed its own unguided mandatory sentence, Alabama's law infringes petitioner's rights to an unprejudiced, passion-free sentencing determination before the judge.

This Court has long stressed the importance, particularly in capital cases, of making all efforts to ensure that defendants are tried and sentenced in an atmosphere which appears free

of undue passion and prejudice. Thus, Gardner v. Florida, 430 U.S. at 358, held that "it is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." See also Sheppard v. Maxwell, 384 U.S. 333 (1966); Turner v. Louisiana, 379 U.S. 466 (1964); Irvin v. Dowd, supra.[20]

Common sense, as well as the 82% death sentence rate during the first 33 months of the Alabama law's operation,[21] dictates that Alabama trial judges' review of juries' initial death sentences cannot satisfy the requirement of a sentencing proceeding which is -- and appears to be -- free of caprice or emotion.

There is no question that the jury's mandatory sentence in this case was a significant act which affected the trial judge's subsequent sentencing determination. Alabama's law states that the judge can impose the death sentence only after "weighing . . . the fixing of punishment at death by the jury." § 13-11-4. The trial judge was also confronted with the provision of Alabama's death penalty law which allowed him to sentence petitioner to death if there was only one aggravating circumstance present. § 13-11-4. This provision meant that an aggravating circumstance finding was justified on the basis of a guilty verdict alone. Thus, the statute's list of aggravating circumstances included the following: "The capital felony was committed while the defendant was engaged or was an accomplice in the commission

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20 Even without evidence of actual prejudice, this Court has invalidated statutes on the ground of institutional pressures which those laws inescapably placed on the judge. E.g., Connally v. Georgia, 429 U.S. 245 (1977); Ward v. Village of Monroeville, 409 U.S. 57 (1972).

21 Respondent's Brief in Opposition to Petition for Writ of Certiorari, Jacobs v. Alabama, n.2, supra at 10.

. . . of robbery. . . ." § 13-11-6(4). Because the jury had already found petitioner guilty of robbery-intentional killing, this aggravating circumstance -- enough to justify sustaining the jury's sentence -- was automatically present, as the judge found (Tr. 812-13).

In these circumstances, Alabama's provision for trial judge review of the jury's previous sentence cannot be squared with this Court's rulings on the need for maintaining the appearance of utmost independence, impartiality and dispassion on the part of sentencing judges.

IV.

THE AGGRAVATING CIRCUMSTANCE PROVISION OF ALABAMA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONALLY VAGUE AND HAS BEEN SO INCONSISTENTLY APPLIED THAT IT DOES NOT COMPLY WITH THIS COURT'S FURMAN DECISION AND THE VOID-FOR-VAGUENESS DOCTRINE

The trial judge's decision to sustain the jury's death sentence rested in part on his finding, pursuant to the aggravating-circumstance provision of Alabama's law (§ 13-11-6), that petitioner's crime was "especially heinous, atrocious, or cruel" (Tr. 813).

On its face, this aggravating-circumstance provision is so broad and vague that it raises a serious question as to whether it gave petitioner -- or any other Alabama capital defendant -- reasonable notice as to the circumstances under which he might receive a death sentence. As stated by one Alabama trial judge who refused to make an "especially heinous, atrocious, cruel" finding in a recent capital case:

> "'The capital felony was especially heinous, atrocious, or cruel.' Well, I didn't really know what they're talking about there. I'll say at best this felony was totally senseless. I don't know about cruel, what people's different definitions of atrocious, heinous or cruel is - whether they're talking about torture or what, but if robbing somebody and taking their money and then shooting them through the heart is considered heinous then this crime was heinous. I don't know that that's what they're talking about. I'll be honest with you, I really don't know." Quoted in Ex parte Recardo Cook (Ala. Supreme Court, No. 77-320, Sept. 15, 1978), slip op., p. 22 (Maddox, J. concurring).

In petitioner's case, which also involved robbery and allegedly intentional killing, but where an "especially heinous" finding was made, the trial judge did not even consider the provision's ambiguity and invoked the provision perfunctorily.

This disparity graphically demonstrates that this provision has been applied so inconsistently that Alabama's system for adjudicating capital cases has the same potential for capricious, discriminatory application that this Court condemned in Furman. See also Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (due process violated by vague statute because "there are no standards governing the exercise of the discretion granted by the ordinance" and "the scheme permits and encourages an arbitrary and discriminatory enforcement of the law").

Appellate proceedings in this case provided no guidance as to the meaning of this provision. Moreover, unlike the appellate review of death sentences approved in Gregg v. Georgia, supra, 428 U.S. at 198, the Alabama appellate courts made no serious effort to ensure that the factual situation and aggravating circumstances in this case were similar to others where the death penalty was imposed.[22]

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22 The only relevant finding on appellate review was that "the facts in this case, after a careful evaluation, show a marked (Footnote Continued)

In sum, Alabama's inability to apply this vague sentencing provision with any consistency underscores the need for this Court to delineate the limits which the void-for-vagueness doctrine imposes on capital sentencing provisions.

V.

THE OVERALL OPERATION OF ALABAMA'S DEATH PENALTY STATUTE IS SO PREJUDICIAL TO PETITIONER'S RIGHTS AT BOTH THE GUILT AND SENTENCING STAGES THAT IT VIOLATES THE DUE PROCESS CLAUSE AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE

This Court has never departed from the principle announced in Witherspoon "that the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." 391 U.S. at 521-22, n.20. In its overall operation, taking into account each successive stage of the trial, sentencing and appellate process, Alabama's death penalty statute offends this principle.

At each stage of Alabama's capital punishment proceedings, petitioner was deprived of significant procedural safeguards. At trial, the protection afforded by the beyond-reasonable-doubt standard was undermined because he could not receive a lesser-offense instruction. Nor was petitioner given a chance to appeal to the jurors' standards of decency with evidence of miti-

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22 (Footnote Continued)

similarity with those in Jacobs v. State, [361 So.2d 607]." Beck v. State, 365 So.2d 985, 1005 (Ala Crim. App. 1978). This conclusion is simply implausible. Even construing the facts in this case most favorably for the prosecution, petitioner's case has little in common with the Jacobs case. In its affirmance of the Court of Criminal Appeals decision, the Alabama Supreme Court undertook no independent review of the facts of the case. Beck v. State, 365 So.2d 1005-06 (Ala. 1978).

gating circumstances relevant to the issue of whether a death sentence should be imposed. The "conscience of the community" was effectively eliminated in petitioner's sentencing proceeding. The restraints imposed by Alabama's law meant that the jury acted as a "tribunal organized to return a verdict of death,"[23] which is precisely what this Court condemned in Witherspoon, Woodson, and Roberts.

No capital punishment statute in any state other than Alabama imposes such severe restraints on the jury's capacity to find facts fairly on the issue of guilt and to express the community's standards of decency on the issue of the death sentence. Alabama's idiosyncratic death penalty statute is even less representative of this nation's overall societal outlook on the issue of capital punishment than the several mandatory death penalty statutes invalidated by this Court's rulings in Woodson and successor cases.

Nor is Alabama's statute saved by its provision for review by the trial judge and the appellate courts of the jury's mandatory imposition of the death sentence. During the first 33 months of the Alabama statute's operation, Alabama trial judges affirmed the sentences of 37 of the 45 capital defendants convicted and sentenced to death by the jury. This is a strong indication that the trial judges' decisions have been impermissibly influenced by the juries' initial mandatory sentences. It also confirms that Alabama's administration of capital punishment cannot be squared with this Court's view "that under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murder-

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23 Witherspoon v. Illinois, supra, 391 U.S. at 521.

ers." Woodson v. North Carolina, supra, 428 U.S. at 296.

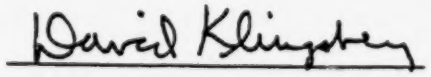
Finally, as demonstrated in this case, Alabama's sentencing provision with respect to aggravating circumstances is unduly vague and has been inconsistently applied by Alabama's trial and appellate courts. Alabama's appellate review of death sentences has neither cured the vagueness problem nor insured that death sentences are imposed with the rationality and fairness required by this Court's decisions in Furman, Gregg, Proffitt and Jurek.

CONCLUSION

For the reasons stated herein, petitioner respectfully requests that a writ of certiorari be granted.

Dated: May 1, 1979

Respectfully submitted,



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APPENDIX

APPENDIX A AND APPENDIX B, THE OPINIONS OF THE SUPREME COURT OF ALABAMA AND THE COURT OF CRIMINAL APPEALS OF ALABAMA CAN BE FOUND IN THE PRINTED APPENDIX VOLUME AT PAGES 17 AND 53.

Supreme Court of the United States

APPENDIX C

No. A-758

GILBERT FRANKLIN BECK,

Petitioner,

v.

ALABAMA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 1, 19 79

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 26th day of February, 19 79

A true copy MICHAEL RODAK, JR.
Test:
Clerk of the Supreme Court of the United States
BY
Deputy

APPENDIX D.

13-11-1. Limitation on imposition of death penalty or life sentence without parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, § 1.)

13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when

the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2.)

13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.

If the jury finds the defendant guilty of one of the

aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3.)

13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

13-11-5. Conviction and sentence to death subject to automatic review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5.)

13-11-6. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6.)

13-11-7. Mitigating circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

13-11-8. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8.)

13-11-9. Effective date.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10.)

15-17-1. Verdict may be for lesser offense than charged; verdict for offenses included in offense charged.

When an indictment charges an offense of which there are different degrees, the jury may find the defendant not guilty of the degree charged and guilty of any degree inferior thereto or of an attempt to commit the offense charged; and the defendant may also be found guilty of any offense which is necessarily included in that with which he is charged, whether it be a felony or a misdemeanor. (Code 1852, § 647, Code 1867, § 4199; Code 1876, § 4904; Code 1886, § 4482; Code 1896, § 5306; Code 1907, § 7315; Code 1923, § 8697; Code 1940, T. 15, § 323.)

Supreme Court, U. S.
FILED
MAY 1 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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No.

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_____

GILBERT FRANKLIN BECK, Petitioner

v.

STATE OF ALABAMA

_____

CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of April, 1979, copies of a petition for writ of certiorari to the Supreme Court of Alabama, and a motion to proceed in forma pauperis were mailed first class airmail, postage prepaid to the Hon. Charles Graddick, Attorney General, State of Alabama, and to the Hon. James Hampton, Assistant Attorney General, 64 North Union Street, Montgomery, Alabama 36104. I further certify that all parties required to be served have been served.

David Klingsberg

DAVID KLINGSBERG
Counsel for Petitioner

Supreme Court, U. S.
FILED
NOV 21 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6621

GILBERT FRANKLIN BECK
PETITIONER,

VS.

STATE OF ALABAMA
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR CERTIORARI FILED MAY 1, 1979
CERTIORARI GRANTED OCTOBER 9, 1979

TABLE OF CONTENTS

STATE TRIAL DOCKET [Excerpts]
Circuit Court of Etowah County, Alabama

Attorneys	*Parties*	*Action*	*Sheriff's*
Case No. 12748 James Hinton Lyndol Bolton	The State vs. Gilbert Franklin Beck, alias	Robbery with aggravated circumstances of 1st Deg. Murder Indictment filed 11-24-76	G. J. Dt— Page

Date	*Judgments and Orders of Court*
6/10/77	[The defendant plead not guilty to the charge of robbery with aggravated circumstances of first degree murder, with an additional plea of not guilty by reason of insanity.]

Date	*Orders of Court*
6/24/77	Jury trial and verdict, "We, the Jury, find the defendant, Gilbert Franklin Beck, guilty of robbery with aggravated circumstances where Roy Malone was intentionally killed as charged in the indictment, and we fix the punishment at death," signed Chester M. Cochran, Foreman Cyril L. Smith Judge
7/20/77	[Hearing on mitigating circumstances held.]
7/29/77	[Defendant Beck is sentenced to death by electrocution.]
8/23/77	Written notice of appeal filed.

ARRAIGNMENT AND PLEA

On this the 10th day of June, 1977, comes the State by Hon. W. W. Rayburn, District Attorney for the 16th Judicial Circuit, who prosecutes for the State of Alabama in this behalf, and the defendant, Gilbert Franklin Beck, alias Gilbert F. Beck, alias Gilbert Beck, being present in open Court in his own proper person and by attorneys representing him, and the defendant upon being duly arraigned and hearing the Indictment against him read, declines to plead, and the Court enters a plea of not guilty thereto, for him, and thereupon an additional plea of not guilty by reason of insanity is hereby entered by defendant; and It appearing to the Court that the defendant is indicted, charged with a capital felony; to-wit: Robbery with Aggravated Circumstances of 1st Degree Murder, It is therefore ordered by the Court that this cause be and the same is hereby set down for trial for Monday, June 20, 1977. It is further ordered by the Court that the Sheriff summon not less than 120 nor more than 120 persons qualified to serve as jurors for the selection of a jury to try this cause, to-wit: 120 persons. And it appearing to the satisfaction of the Court that 120 persons have been drawn by the presiding judge of this Court in open Court to serve as regular jurors for the week of the present term of said Court beginning Monday, June 20, 1977, the week in which this cause is set for trial. The Sheriff is directed by this Court forthwith to serve upon the defendant, at least one day before the day set for trial, a list of names of the regular jurors drawn for the week of the present term of this Court beginning Monday, June 20, 1977, together with a copy of the indictment in this case as required by law.

THE COURT: Ladies and gentlemen, I hate to do it, but I'm going to have to turn off the air conditioner to make sure that you understand the charge.

I want to start out by telling you that an attorney is an officer of the court. It is his duty to present evidence on behalf of his client and [729] make such objections as he deems proper and to fully argue his client's cause.

An attorney's statements and arguments are intended to help you to understand the evidence and to apply the law. However, they are not evidence and you should disregard any remark, statement or argument which is not supported by the evidence or by the law as given to you by the Court. Likewise, statement made by the Court are not evidence and not to be so considered by you. The evidence that you will consider will be that which came from the witness stand and the Exhibits, which you will take out with you. The law that you will consider will be the law as I charge you in this case.

Ladies and gentlemen of the jury, the indictment in this case is that Gilbert Franklin Beck committed a robbery against the property of Roy Malone by taking certain property from his person or his presence against his will by violence to his person or putting him in such fear as to unwillingly part with the same and also that during the course of said robbery defendant did unlawfully, intentionally and with malice aforethought kill Roy Malone, [730] the victim of said robbery, by cutting said Roy Malone with a knife.

In this charge—the indictment charges the defendant with a capital felony. A capital felony is a crime that is punishable by death in the electric chair. And I will attempt to define to you in the course of this charge the material elements contained in these offenses charged against the defendant.

The indictment in this case you will take out with you. The indictment is not evidence in this case and the fact that Defendant has been indicted is not to be considered by you as a circumstance against him, but the indictment is merely the method of placing the Defendant on his trial. Now, the Defendant on the reading of the indictment at arraignment,

a plea of not guilty was entered for him, and that is, Defendant says he is not guilty of any of the charges contained in the indictment. In addition to the plea of not guilty, Defendant has interposed the plea—additional plea of not guilty by reason of insanity.

Defendant is presumed to be innocent until he is proven guilty [731] beyond a reasonable doubt by all the evidence in the case. He comes into Court clothed with this presumption and this presumption follows him throughout the course and the proceedings of the trial until the evidence produced by the State convinces each of you beyond a reasonable doubt of his guilt. The presumption of innocence is to be regarded by the jury in every case as a matter of evidence to the benefit of which the accused is entitled and as a matter of evidence this presumption attends the accused until his guilt is by the evidence placed beyond a reasonable doubt.

In this case, as in all other cases where the Defendant pleads not guilty, the burden of proof is upon the State to convince each member of the jury beyond a reasonable doubt as to the truth of the material averments contained in the indictment. The term "reasonable doubt" means a doubt which has some good reason for it arising out of the evidence in the case. Such a doubt as you are able to find in the evidence a reason for. It means an actual and substantial doubt growing [732] out of the unsatisfactory nature of the evidence in the case. It does not mean a doubt which arises from some mere whim or from any groundless surmise or guess. While the law requires you to be satisfied of the Defendant's guilt beyond a reasonable doubt it at the same time prohibits you from going outside of the evidence to hunt up doubts upon which to acquit the Defendant. In arriving at your verdict it is your duty to carefully consider the entire evidence in the case, and in so doing you should entertain such doubts only as arise from the evidence and are reasonable as already defined, and unless the doubt is a reasonable one and does so arise it will not be sufficient in law to authorize a verdict of not guilty.

Then, ladies and gentlemen, if upon a careful review of all of the evidence you ask your inward conscience, "Is he the guilty one?" And the answer is, "I doubt if he is." You should acquit, but if your answer is, "I have no reasonable doubt about it." You should convict. So, then, ladies and

gentlemen, by a reasonable doubt is not meant absolute certainty. There is [733] no such thing as absolute certainty in human affairs for justice is, after all, but an approximate science and its ends or not to be defeated by the failure of strict and mathematical proof.

The guilt of a defendant may be proved by circumstantial evidence as well as by direct evidence. The test of sufficiency of circumstantial evidence is whether the circumstances as proved produce a moral conviction to the exclusion of all reasonable doubt of the guilt of the accused, whether they are incapable of explanation upon any reasonable hypothesis consistent with his innocence. Upon circumstantial evidence there should not be a conviction unless to a moral certainty. It excludes every other reasonable hypothesis than that of the guilt of the Defendant. No matter how strong may be the circumstances, if they can be reconciled with the theory that someone other than the Defendant may have done the act, then the guilt of the Defendant is not shown by the full measure of proof the law requires.

If a person aids or abets another in the commission of a crime he is as guilty as the party who commits the [734] crime and is thus aided and abetted by him. The words "aid and abet" as I have used them in this charge comprehend all assistance rendered by act, words, encouragement, support or presence, actual or constructive to render assistance should it become necessary.

The State has the burden of satisfying the jury beyond a reasonable doubt from the evidence that there was by prearrangement or on the spur of the moment a common enterprise or adventure and that a criminal offense was contemplated before you would be justified in finding the Defendant was an aider or abetter. When by prearrangement or on the spur of the moment two or more persons enter upon a common enterprise or adventure and a criminal offense is contemplated, then each is a conspirator and if the purpose is carried out each is guilty of the offense committed whether he did any overt act or not. This rests on the principle that one who is present, encouraging, aiding, abetting, or assisting the active perpetrator in the commission of the offense is a guilty participant and in the eyes of the law is equally guilty with one who [735] does the act. Such community of

purpose or conspiracy need not be established by direct positive testimony due to its inherent nature, but the jury must determine whether or not there is such a conspiracy on the part of the defendant and its extent, if any, from all the testimony in the case and the actions and the statements of the alleged conspirators and the defendant.

In general, a conspiracy comes into being when two or more persons enter upon an unlawful enterprise with a common purpose to aid, assist, advise or encourage each other in whatever may grow out of the enterprise upon which they enter. Each is responsible for everything which may consequently and proximately result from such unlawful purpose, whether specifically contemplated or not and whether actually perpetrated by all or less than all of the conspirators. While the parties are responsible for consequent acts growing out of the general design they are not responsible for independent acts growing out of particular acts of individuals.

With regard to the alleged confession or statement of the Defendant, you may [736] consider all of the facts and circumstances surrounding the taking of the alleged confession or statement in determining the weight or credibility, if any, which you give to the alleged confession or statement.

As I stated earlier in this case, the Defendant has entered a plea—special plea of not guilty by reason of insanity. One of the pleas of the Defendant to the indictment in this case is the special statutory plea of not guilty by reason of insanity. Under our law the question of the accountability of a person for criminal actions can be tryable only under a special plea of insanity imposed at the time of arraignment of the Defendant. The defense of insanity must be specially pleaded as it is plead in this case because the plea of the general issue, that is, not guilty, does not put in issue the question of responsibility of the accused by reason of the alleged insanity, and without this special plea the Defendant could not offer evidence of his insanity. The purpose of the statute has been said to be to separate as far as possible the two defenses, not guilty and not [737] guilty by reason of insanity, and to have the proof directed to each of the two defenses and the verdict to respond to each of these two defenses. Reason being, the common gift of God to every man.

Every man is presumed to be sane. That is, of natural or normal mental condition, and I charge you that under the laws of Alabama every person over fourteen years of age charged with a crime is presumed to be reasonable for his acts.

The rules of evidence in criminal cases places on the State the burden of proving every element of the crime charged against the Defendant and require that in order to convict the jury must be satisfied of the Defendant's guilt beyond a reasonable doubt and to a moral certainty. Since intent is one of the elements that the State must prove in murder, in first degree manslaughter, and since there can be no intent if the accused is not sane it follows that where a Defendant in a homicide case sets up a plea of insanity and the jury has a reasonable doubt on the question they could not find him guilty of murder by reason of insanity. However, as stated insanity [738] would not be a defense—disregard that last part because that is not included in this indictment.

If, from all of the evidence in the case, you have a reasonable doubt as to whether the Defendant was insane, as has been defined to you, then it is your duty to render a special verdict that the Defendant is not guilty by reason of insanity. In this event the form of your verdict would be, "We, the jury, find the Defendant not guilty by reason of insanity."

As to the robbery charged in the indictment, robbery is the feloneous taking of money or goods of value from the person of another or in his presence by violence to his person or by putting him in fear. The essential element of the crime may be subdivided as follows: One, a feloneous intent, that is, an intent to rob. Second, force or by putting in fear as a means of effectuating the intent. Three, and by that means a taking and carrying away of the property of another from his person or in his presence. The burden is upon the State to satisfy the jury from the evidence beyond a reasonable doubt as to each of the three elements I have [739] just enumerated. In the nature of things all these elements must concur in point of time. If force is relied on in proof of the charge it must be the force by which another is deprived of and the offender gains the possession. If putting in fear is relied upon it must be the fear under duress in which the possession is parted with. The taking must be the result

of the force or fear and force or fear which is a consequence, a result of the taking rather than the means of the taking will not suffice. Violence or putting in fear to constitute one of the elements of robbery must precede, that is, come before or accompany the taking of the property. The words, "taken from the person of another" mean not only taking property which is in actual contact with the person, but includes also in the taking by violence or intimidation from the person wronged in his presence of property which either belongs to him or which is under his personal protection and control.

I will now attempt to define murder in the first degree to you. Murder in the first degree is the willful, deliberate, malicious and premeditated [740] killing of a human being. Malice, willfulness, premeditation and deliberation, these four things, must co-exist before a Defendant can be convicted of murder in the first degree. And the burden is upon the State of Alabama in this case to convince you, ladies and gentlemen of the jury, beyond a reasonable doubt, and to a moral certainty, that these four elements did co-exist before the Defendant can be convicted of murder in the first degree, which is the highest degree of unlawful homicide.

Willfulness, as an ingredient of murder in the first degree, means governed by the will without yielding to reason—It means intention. Malice, in law, does not necessarily mean hate or ill-will, but it is defined as any unlawful act willfully done without just cause or legal excuse. It is that mental state or condition which prompts the doing of an unlawful act without legal justification or extenuation. A jury may or may not infer malice from the use of a deadly weapon, unless the evidence which proves a killing shows also that it was perpetrated without malice, and whenever [741] malice is shown beyond a reasonable doubt, and is unrebutted by the circumstances of the killing, there can be conviction for a less degree of homicide than murder.

This indictment charges the killing was unlawful, intentional and with malice aforethought. Intent expresses mental action at its most advanced point or as it actually accompanies an outward corporal act which has been determined on. Intent shows the presence of will, and that the act which consumates a crime. It is the exercise of intelligent will, the mind being fully aware of the nature and consequence of the act which is about to be done, and with

such knowledge and with full liberation of action willing and electing to do it.

The act under which the Defendant is being tried, as the attorneys have stated to you, is a new law passed by the Legislature, who is the duly authorized body to pass the laws of the State of Alabama. This is in Title 15 under Section 342. The act provides, "If the jury finds the Defendant guilty they shall fix the punishment of death when the Defendant is charged by [742] indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses."

Ladies and gentlemen, so far as Roy Malone is concerned, if he is acquitted in this case he can never be tried for anything that he ever did to Roy Malone. This is the only thing unless there happened to be something to cause a mistrial or reindictment.

One of the offenses listed as aggravation under this is robbery or attempts thereof when the victim is intentionally —no—intentionally killed by Defendant. In such cases as the one I just read, if the jury finds the Defendant not guilty the Defendant must be discharged. The Court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or failure of the jury to agree on the fixing of the penalty of death. Then, after a judgment of mistrial the Defendant may be tried again, but not if he is found not guilty.

Aggravating circumstances, capital [743]—is one where a capital felony was committed with the Defendant was engaged or was an accomplice in the commission of or attempt to commit or flight after committing or attempting to commit rape, robbery, burglary, or kidnapping for ransom.

Ladies and gentlemen, all twelve of you must agree before you can reach any verdict in this case. Your verdict must be the verdict of each and every juror. You are the sole judges as to the weight that should be given to all of the testimony in this case. The judge's duty is to decide the law. The jury's duty is to determine the facts. I have no opinion as to the facts in this case and I don't want you to think from anything that I have said in this charge or otherwise or from any ruling that I have made that I think one way or another about the facts in the case.

You, ladies and gentlemen, take the testimony of the witnesses together will all proper and reasonable inferences therefrom, apply your common sense, and in an honest and impartial way determine what you believe to be the truth. You should weigh all of the [744] evidence and reconcile it, if you can reasonably do so, but if there be irreconcilable conflict in the evidence you ought to take that evidence which you think is worthy of credit and give it just such weight as you think it is entitled to. You may take into consideration any interest any witness might have in the outcome of this case.

Ladies and gentlemen, if you believe that any material part of the evidence of any witness is willfully false you may disregard all of the testimony of such witness. The Defendant is authorized to testify in his own behalf and you may consider the testimony of the Defendant together with all the other evidence in the light of the fact that he is the Defendant and the interest he has in your verdict. This is to be taken in connection with all the other evidence.

Proof of good character, in connection with all the other evidence, may generate a reasonable doubt which entitles the Defendant to an acquittal even though without such proof the jury would convict. [745]

Now, ladies and gentlemen, you heard the testimony offered as to the good character of the Defendant in this case, and the law on that subject is this: Good character, if proven for the Defendant and taken in connection with all the other evidence, may generate a reasonable doubt which would entitle the Defendant to an acquittal even though without such proof the jury would convict. If any witness testifying has been impeached, then the jury may disregard his testimony unless his testimony be corroborated by other testimony not so impeached.

Now, you, ladies and gentlemen, consider the charge in the indictment. If after you have considered all the testimony, all the evidence in the case, and all proper and reasonable inferences therefrom you are satisfied beyond a reasonable doubt the Defendant was guilty of the robbery and the willful killing of Roy Malone, then the form of your verdict should be "We, the jury, find the Defendant, Gilbert Franklin Beck, guilty of robbery with aggravated circumstances

where Roy Malone was intentionally killed as charged in the indictment and [746] we fix the punishment at death."

On the other hand, ladies and gentlemen, if after you have considered all of the testimony in the case, all the evidence and all the reasonable and proper inferences therefrom and the law as the Court has given it to you, if from all of that you are not satisfied beyond a reasonable doubt that Defendant was guilty of this offense, then it would be your duty to find him not guilty, and the form of your verdict would be, "We, the jury, find the Defendant, Gilbert Franklin Beck, not guilty."

As I stated, there was another form of verdict that you could return. Three forms of verdict that you could return would be, "We, the jury, find the Defendant guilty." Or, "We, the jury, find the Defendant not guilty." Or, "We, the jury, find the Defendant not guilty by reason of insanity."

(At the bench)

MR. RAYBURN: Would it be possible to add on this Act, that Section III, tell them about that? If they find guilty, or you rather leave that out? You know, about the subsequent hearing that's [747] had.

THE COURT: No, I'm not going into that because that's not for their deliberation.

MR. BOLTON: Your Honor, I take issue with the form of this verdict, "We, the jury, find the Defendant, Gilbert Franklin Beck, guilty of robbery with aggravated circumstances where Roy Malone was intentionally killed as charged in the indictment and we fix the punishment at death." I contend, your Honor, that the—that it would have to go further than that. He could be intentionally killed and there's no malice aforethought, anything else alleged. He could be intentionally killed and he could be guilty of Manslaughter in the First Degree. For that I take exception to the form of the verdict, your Honor. Just one other thing.

MR. HINTON: Your Honor, we take exception to the Court's charge in regard to the conspiracy aspect of your charge as to the intention of the defense that conspiracy is not enumerated in the act nor is it set out in the act, and conspiracy to murder or conspiracy to rob under the laws of Alabama at the present time would be a lesser [748] included offense, but for the wording of the statute in this case.

MR. BOLTON: Your Honor, further that it is—when you're talking about aiding and abetting, your charge as to aiding and abetting a person to aid a crime, I take exception to your Honor's charge of the jury relative to aiding and abetting in its fullness, in its entirety. I particularly, your Honor, take exception to the reference that your Honor gave to this particular Act on 213 that you're talking about aggravating circumstances and quoted from Section 6, Subsection D.

THE COURT: Uh huh.

MR. BOLTON: The indictment—the charge does not fit the indictment. The indictment charged robbery, aggravated circumstances were murder in the First Degree. Now, the jury in this case, and when I said, your Honor, that I took exception with your Honor's verdict, the guilty verdict, the indictment charges murder in the First Degree with malice aforethought, and I submit that the aggravated circumstances that he's alleged and the form of his indictment, he has absolutely alleged that the aggravation [749] was the robbery. He alleges the robbery to start with, but he alleges the aggravation to be the—

THE COURT: That's what I charged.

MR. BOLTON: I understand, but there is nothing in Subsection D dealing with anything dealing with murder. It says, committing a rape, robbery, burglary, kidnapping for ransom. Nothing in Subsection D of Section 6 says anything about aggravation being murder. It's totally inconsistent with his indictment. Now, if the verdict form as is drawn could—He could be guilty if the Court—in this verdict form if he committed a robbery and then committed First Degree Manslaughter, which would be without malice, without aforethought, because, your Honor, has only said in this verdict form intentional killing, and I submit to your Honor that there is a distinct difference between the unlawful taking of human life with intention.

THE COURT: I've charged them as to intention.

MR. BOLTON: I understand that, but the verdict form, it doesn't say—I'm just saying, your Honor, that it would have to go further, that he with malice aforethought did intentionally—[750] premeditation, malice aforethought, premeditation. Did intentionally take the life of Roy Malone as set out in the indictment. Nothing else but just what's set

out in the indictment, and it's a variance from the indictment, your Honor.

(In open court)

THE COURT: Ladies and gentlemen, I have correct charges of law which the Defendant has prepared and requested be given to you, which I will now give to you and you will be able to take these to the jury deliberation room along with the indictment, the verdict forms, and the exhibits.

If you have a reasonable doubt of Defendant's guilt growing out of the evidence or any part of that you must acquit him.

The Court charges the jury that the intent to kill by the Defendant is an essential element of the offense charged in the indictment, and you cannot convict the Defendant unless you believe beyond a reasonable doubt that Defendant intentionally killed Roy Malone.[751]

The Court charges the jury that before you find a verdict of guilty each of your number must be convinced beyond a reasonable doubt of the guilt—of Defendant's guilt beyond a reasonable doubt and each of you must believe beyond a reasonable doubt the penalty of death should be rendered by the jury against the Defendant.

The Court charges the jury that you cannot fix the penalty of death until each and every member of the jury is convinced beyond a reasonable doubt and to a moral certainty that the penalty of death should be imposed upon the Defendant.

The Court charges the jury that although you may believe from the evidence that Defendant murdered Roy Malone as charged in the indictment, yet if you have a reasonable doubt whether the Defendant robbed Roy Malone you cannot convict the Defendant.

The Court charges the jury that in the event that all of your number cannot agree upon a verdict, that judgment of mistrial must be entered by the Court and that Defendant may be tried again for the aggravated offense or may be [752] reindicted for an offense wherein the indictment does not allege an aggravated circumstance.

The Court charges the jury that you cannot convict the Defendant under this indictment if you believe beyond a reasonable doubt and to a moral certainty that Defendant is guilty of robbery and if you do not believe beyond a rea-

sonable doubt and to a moral certainty that Defendant is guilty of the offense of murder in the First Degree as charged in the indictment.

The Court charges the jury that you cannot convict the Defendant if you believe from the evidence Defendant is guilty of the offense of Murder in the First Degree as charged in the indictment, if you do not believe beyond a reasonable doubt and to a moral certainty the Defendant is guilty of the offense or robbery as charged in the indictment.

The Court charges you that you cannot convict the Defendant if you are not convinced beyond a reasonable doubt and to a moral certainty that Defendant is guilty of robbery as charged in the indictment and Murder in the First [753] Degree as charged in the indictment.

The Court charges the jury, if you are not convinced beyond a reasonable doubt that Defendant robbed Roy Malone as charged in the indictment and murdered Roy Malone as charged in the indictment and you are not convinced beyond a reasonable doubt on the fixing of death you cannot convict the Defendant and fix his punishment at death.

The Court charges the jury that you must be convinced beyond a reasonable doubt and to a moral certainty that Defendant did commit the offense of robbery against the person of Roy Malone as alleged in the indictment, and you must be convinced beyond a reasonable doubt and to a moral certainty that the Defendant did commit the offense of Murder in the First Degree against the person of Roy Malone as charged—as alleged in the indictment before you can return a verdict of guilty.

Ladies and gentlemen, in your deliberation you will first determine—and also as to the guilt of the Defendant, of course, if you find—if all twelve of you agree that he is not guilty, then that would end your deliberation. Of course, if after [754] deliberating all twelve of you agreed—reached the verdict that he was guilty, then you would go one step further and then you would all twelve have to agree as to the fixing of the death penalty in this case.

Ladies and gentlemen, when you have reached the verdict in this case then you will complete one of the verdict forms in the form that I have given you and one of your number to be selected and designated by you will sign the verdict of the jury as foreman.

The verdict must be the verdict of all twelve of you, as I have explained, as to not guilty or guilty and as to the death penalty. All twelve of you must agree before you can return a verdict.

When the verdict has been completed it will be necessary for you to return into Court and there give your verdict.

Ladies and gentlemen, due to the lateness of the hour I'm going to let ya'll retire for the night. I hope you will give prayerful consideration to all the evidence in this case and to justice between the State of Alabama and the Defendant, Mr. Beck. You may go with the—And in the morning you [755] will start your deliberations.

(Jury excused in the custody of the bailiffs.) [756]

CIRCUIT COURT OF ETOWAH COUNTY ALABAMA

[Jury finding of guilt of Petitioner Beck]

THE COURT: Will the foreman read the verdict.

THE FOREMAN: "We, the jury, find the Defendant, Gilbert Franklin Beck, guilty of robbery with the aggravated circumstances where Roy Malone was intentionally killed as charged in the indictment and we fixed the punishment of death. Chester M. Cochran."

THE COURT: Will the bailiff bring the verdict foreward.

Now, I'll have to poll each of you, so each of you answer out whenever I ask you this question.

(Each juror, upon being asked by the Court, "Is that your verdict", answered in the affirmative.)

THE COURT: Ladies and gentlemen, I thank you for your patience. At this time I'm going to let you—you are relieved from any further consideration of this Court.

Take the jury back to the deliberation room for a short period of time.

(Jury excused) [758]

[The sentence of death by the Alabama Trial Court]

THE COURT: Mr. Beck, do you have anything to say before sentence of the Court is imposed upon you?

THE DEFENDANT: No.

THE COURT: Gilbert Franklin Beck, it is the sentence of the Court, and I pronounce it upon you, that you be put to death on Friday, October 28th, 1977, at the William C. Holman unit of the prison system at Atmore, by causing to pass through your body a current of electricity of sufficient intensity to [813] cause death and the application and continuance of such current through your body until you are dead.

Since this is an automatic appeal let the record show that the sentence is ordered suspended pending the outcome of the decision of the appellate court's—final determination by the appellate courts.

* * * * * [814].

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1977-78

7 Div. 560

GILBERT FRANKLIN BECK, ALIAS

v.

STATE

Appeal from Etowah Circuit Court

Opinion—Filed April 4, 1978

DeCARLO, JUDGE

Capital felony; death.

This cause is before this court under the Automatic Appeal Act; Act No. 213, Acts of Alabama, 1975, which mandates that appellant, Gilbert Franklin Beck's death sentence set by the circuit court of Etowah County, be reviewed by this court.

It is an appeal from a conviction of murder under Alabama's new Death Penalty Act, committed during the course of a robbery.

Pursuant to this authority, the judgment of conviction and sentence of death have been given a priority review as has been the practice of this court in considering all death cases.

Gilbert Franklin Beck was indicted by the grand jury of Etowah County on a charge of robbery with aggravating circumstances of intentionally killing the victim. The indictment, omitting the formal parts reads as follows:

"Gilbert Franklin Beck. . . . whose name to the Grand Jury is otherwise unknown than as stated, feloniously took three (3) twenty-dollar bills, lawful United States currency, of the value of $60.00; one (1) ten-dollar bill, lawful United States currency, of the value of $10.00; and three (3) one-dollar bills, lawful United States currency,

of the value of $3.00, all of the aggregate value of $73.00, the property of Roy Malone, from his person or in his presence, and against his will, by violence to his person, or by putting him in such fear as unwillingly to part with the same, and during the course of said robbery the said defendant did unlawfully and intentionally, and with malice aforethought, kill Roy Malone, the victim of said robbery, by cutting the said Roy Malone with a knife. . . ."

On November 29, 1977, a motion to quash the indictment was filed along with a petition for a change of venue and a motion to produce. On February 10, 1977, the court granted the defendant's motion to produce and on February 18, 1977, appellant's motion for a mental examination was also granted. An amended motion to quash the indictment was filed on February 25, 1977, and this motion and the petition for a change of venue were both denied.

On February 25, 1977, the court ordered that the appellant be sent to Bryce Hospital for a mental examination and, on that date, defendant filed a demurrer to the indictment. Aproximately three months later, June 10, 1977, the defendant filed an additional motion to quash and it, along with the demurrer to the indictment, was overruled.

On that same day an arraignment was held at which time the appellant declined to plead. The court entered a plea on behalf of the accused of not guilty and not guilty by reason of insanity.

Following jury selection, the trial of the case was begun on June 20, 1977.

The evidence produced at trial established that on November 8, 1976, the appellant and one Roy Frank Clements drove to the home of Roy Malone. Malone's home was located in the Shady Grove community in the northern part of Etowah County, near the town of Boaz, Alabama. Mr. Malone was an eighty-year old retired veterinarian and lived in a house with his housekeeper, Dora Mae Ford.

It is uncontroverted that the appellant and Clements went to the Malone home for the specific purpose of robbing Malone. After driving to the Malone home in the appellant's pickup truck, the appellant and Clements engaged Mr. Malone in conversation in his yard. They had gone there on

the pretext of making an inquiry concerning some materials for building chicken pens.

The conversation continued for a few minutes when a yellow Chevrolet, occupied by three men, arrived at the house. The men got out of the car where appellant and Clements were talking to Mr. Malone, and after a short conversation, the appellant and Clements left and returned to Clements' apartment in Boaz. They had left Clements' wife, Debbie, and Marion Thrasher, the woman with whom the appellant had been living for some time, at the apartment.

The appellant and Clements remained at Clement's apartment with the two women until approximately 2:00 P.M., when they again left in the appellant's pickup truck for the Malone residence. Around 2:30 P.M., they arrived at the Malone house the second time. They went inside and found Mr. Malone in the kitchen. Clements, saying that he was going to the bathroom, left the appellant and Mr. Malone alone in the kitchen. Within a short time, Clements returned, and, at a given signal, the appellant grabbed Mr. Malone around the waist and the two wrestled to the floor.

According to the appellant, he and Clements had previously discussed tying Malone up with a rope. The appellant said that while he and Malone were on the floor scuffling he was trying to tie the old man. At that point, appellant testified that Clements came up to Malone and cut him on the right side of his neck. The appellant then stepped over the old man's body, left the house and went to the truck. According to Beck, Clements remained behind in the house approximately three minutes, then came outside carrying a lady's purse and Malone's wallet.

Beck said they subsequently left and returned to Clement's apartment in Boaz, Alabama. When they arrived the women were not there and they could not get into the apartment so they drove to the appellant's trailer and waited there for the two women. Within about fifteen minutes the women arrived and it was then that they determined that some seventy-three dollars was involved in the robbery.

Theron Malone testified that he was the son of the victim and stated that on November 8, 1976, he had gone to his father's house between 4:20 and 4:30 P.M. Theron Malone said that he was alone at the time and that he entered the

house through the kitchen where he found his father's body on the floor. During the trial, he identified not only pictures depicting his father's body, but also identified a wallet which he said belonged to his father. Malone added that he had given the wallet to his father as a Christmas present.

Don Longshore, an investigator with the Etowah County Sheriff's Department, stated that he had made an investigation concerning Malone's death. He testified that he had gone to the Malone home at approximately 5:30 P.M. on the day of the homicide. Longshore said that he remained at the residence for about thirty minutes, then left with his partner, Mr. Hatley, Donald Wiggins and two uniformed deputies and drove to the appellant's house trailer.

According to Longshore, on their arrival, he found the appellant and Mary Ann Thrasher in the trailer. He informed Beck that he wanted to talk to him, and at that point, Thrasher said that he needed to talk to Roy Clements also. Further, Longshore recalled that the Thrasher woman indicated that the appellant and Clements had been together all afternoon.

Longshore testified that, the appellant and Thrasher were placed in one of the squad cars and sent to the courthouse. Afterwards the officers went to the apartment of Roy Clements and he, too, was taken into custody.

Longshore went on to say that after receiving written permission to make a search of the trailer, he and the officers returned to the trailer and while there took into custody a pair of men's boots found in a pickup truck parked at the rear of the trailer. The officers also took into custody a barrel with burned clothing in it that was sitting outside the trailer. The boots were taken to police headquarters and the barrel and the pickup truck were removed to Rodgers' Wrecker Service yard.

After appellant had been warned of his rights, he signed a waiver and made a statement. That waiver and statement were accepted into evidence and read as follows:

"*WAIVER OF COUNSEL BY DEFENDANT IN CUSTODY*

"I, *Gilbert Franklin Beck,* have been informed by the undersigned law enforcement officers, prior to being questioned by them that I am suspected of the offense of

murder 1st Degree in *Etowah* County, Alabama on the *8th* day of *Nov. 1976* and have been informed by them of my Rights as follows:

"1. That I may remain silent and do not have to make any statement at all.

"2. That any statement which I might make may be used against me in Court.

"3. That I have the right to consult with an attorney before making any statement and to have such attorney present with me while I am making a statement.

"4. That if I do not have enough money to employ an attorney, I have the right to have one appointed by the Court to represent me to consult with him before making any statement; and to have him present with me while I am making a statement.

"5. That if I request an attorney, no questions will be asked me until an attorney is present to represent me.

"After having my rights explained to me, I freely and voluntarily waive my right to an attorney. I am willing to make a statement to the officers. I fully understand my rights to an attorney and I have read—had read to me this Waiver of Counsel and fully understand it. No threats of promises have been made to me to induce me to sign this Waiver of Counsel and to make a statement to officers.

"This the *9th day of Nov. 1976. 10:20 A.M.*

"*x Gilbert Beck*

"All of the Rights in the above Waiver of Counsel were read and explained to the above defendant by me and he freely and voluntarily waived the right to an attorney. No threats, promises, tricks, or persuasion were employed by me or anyone in my presence to induce him to waive his rights to an attorney. He freely and voluntarily signed the above Waiver of Counsel in my presence after (having read—had it read).

"Name *Don Longshore*
"Title *Etowah Co. Investigator*

"Witnessed by:
"*Arnold Hatley*
"

"VOLUNTARY STATEMENT

"(Under Arrest)

DATE 11-9-76 TIME *11:05 A.M.* PLACE *Etowah Co. Jail.* I, *Gilbert Franklin Beck,* am *36* years of age and my address is *Main St. In Bear Dipsy Dip Boaz, Ala.* I have been duly warned by *Don Longshore & Arnold Hatley,* who has identified himself as *Etowah Co. Investigator* that I do not have to make any statement at all, and that any statement I make may be used in evidence against me on the trial for the offense concerning which this statement is herein made. Without promise of hope or reward, without fear or threat of physical harm, I freely volunteer the following statement to the aforesaid person:

"On Nov. 8, 1976, me and Mary Ann Thrasher the woman that I have been living with, left our house trailer at the above address & went over to Mary Ann's daughter's home at 259 Mt. Vernon Apts. Boaz, Alabama, the time was approximately 11:00 A.M. to 11:30 A.M.

"We stayed there at their apartment until about 1:00 P.M. eating Cookies & drinking milk & talking about robbing Mr. Malone & Aunt Mae, me & Deborah didn't want to commit the robbery but Mary Ann & Roy kept talking about all the money we could get. Me & Roy then got in my pick up truck & drove to Mr. Malones, after we got down there we stood around & talked for a few minutes when a yellow Chevrolet drove up with three men in it, so we only stayed a few more minutes & went back to Roy Clements apartment in Boaz, we had planned on pulling the Robbery the first trip but this car drove up & we decided to leave.

"After we got back to Roy's apartment after the first trip, we stayed until about 2:00 P.M. to 2:30 P.M. & decided to go back down to Mr. Malone's. We got down there the second time & as we drove up in the driveway Mr.

Malone came to the door & asked us to come inside, we stayed in the house & talked for a few minutes & Roy had gone to the bathroom, as he was coming back from the bathroom I grabbed Mr. Malone & he went down on his knees & hollered for Aunt Mae to get the gun. Roy then grabbed Aunt Mae & hit her in the head with a Rachet wrench that he taken out of my truck, at least four times. I did not do any of the cutting but I did hold Mr. Malone down. After Roy knocked Aunt Mae down he then drug her into the living room & then came to where I was holding Mr. Malone down, if there was anyone cut it had to be Roy that did the cutting. Roy then grabbed the billfold & purse & we ran for the truck, I was the one that was doing the driving, we first drove back to Roy's apartment & Mary Ann & Deborah were not there, so we decided to go to my trailer. We had only been at the trailer a few minutes when Mary Ann & Deborah came in. I was sitting at the kitchen table with the purse & billfold & the money spread out in front of me & Roy had sit down in the living room. There was $73.00 in currency, three $20.00 bills, one ten dollar bill & three $1.00 dollar bills, Roy got two $20.00 dollar bills & gave them to Deborah & I gave Mary Ann $33.00 dollars.

"I then got the shirt & a pair of bluejeans that I had been wearing, got some gas out of the back of the truck & put the clothes in a barrel there close to the trailer, poured gas on them & set them on fire.

"I then went back in the trailer & Mary Ann got some paper sacks out from under the kitchen sink & they put the purse & billfold in the sacks. We then got in Roy's car & drove towards Attalla on highway #431, we got to the foot of the mountain, turned around & started back up the mountain & had got about two thirds of the way back up the mountain when Mary Ann suggested that we throw the purse & billfold over the side of the mountain. Roy then pulled over to the side of the road & I got out, I took the billfold out of the purse & threw it, I then threw the purse sack & all over the mountain at the same place I then got back in the car, Roy was driving & we then drove back by Mr. Malone's, when we got there I knew that they had been found.

"We then drove on back to the trailer, Roy & Deborah stayed a few minutes & then went home.

"I have read the 4 pages of this statement and the facts contained therein are true and correct.

"Witness: *Don Longshore* *Gilbert F. Beck*

"Signed by the arrested Party.

"Witness: *Arnold Hatley* Page *4 of 4 pages.*"

Investigator Leslie Cox, with the Etowah County Sheriff's Department, found a billfold which he identified as State's Exhibit No. 6, on Highway 431 North, better known as the "Boaz highway." He said the billfold was found "off the bluff almost to the top of the mountain up there the top about forty or fifty feet down the bluff." Cox stated that he brought the billfold to the office and gave it to Don Longshore.

Marlon C. Bartlett testified that he knew the deceased, Roy Malone, and knew that he was a retired veterinarian. Malone lived about a mile from Bartlett's father's house. Bartlett recalled that on November 8, 1976, he had gone to see his father and about ten minutes until three he stopped by "Doc Malone's house." Bartlett stated that he saw a pickup truck sitting in the yard and recognized it as being Beck's truck and stated that he saw the truck again on that date when he went to the appellant's residence with some officers from Etowah County.

Roy McDowell was the chief investigator for the Etowah County Sheriff's Department. He testified that he received from Donald Longshore, a man's billfold and a pair of boots which, he identified as State's Exhibits 6 and 9, and stated that he turned these items over to a State Toxicologist.

Roy Cooper knew the victim, Mr. Roy Malone, and stated that it was his understanding that Malone was a retired veterinarian. He recalled that on November 8, 1976, he was in Gadsden, Alabama, with Stewart Rogers and Homer Slaton. On that date, he and the two men went to see Malone relative to selling him some syrup. He said it was about 2:30 P.M. when they arrived at the Malone house and, as they drove up, Cooper saw two men talking to Malone. He

identified the appellant as one of the men but indicated that he had not heard what was being said. According to Cooper, the men left "when I first got there." Cooper described the blue pickup truck that was sitting near the Malone house. He remained at the Malone residence about thirty minutes then left and went home.

During cross-examination, Cooper was asked if he could identify the other man that was with the appellant at the time. At that time, an individual, Danny Reeves, was brought into the courtroom and was identified as being the other person with Gilbert Beck at the Malone house. Cooper also identified a photograph of Roy Clements as depicting the other person at the Malone residence on that occasion. He added that, in his best judgment, the two pictures that he identified, one of the appellant and the other of Roy Frank Clements, were of the two men talking to Mr. Malone on that occasion.

Mary Ann Thrasher testified that she had known the appellant, Gilbert Franklin Beck, for about two years and that prior to November 8, 1976, she had been living with him. She stated that on that date, they were living in a house trailer behind the Dixie Dip, in Boaz, Alabama.

According to Thrasher, around noon on that day, she and the appellant went to see her daughter, Deborah Clements, and her husband, Roy Clements. While there, the appellant said that he was going over to this "old man's house" and "we're going over there to get some money." Thrasher recalled at the time Beck made that statement, he was sitting down sharpening a knife "on a whet rock." She indicated the length of the knife and described it as being "a pocket knife and I believe it was a Case."

Thrasher said when the appellant finished sharpening his knife he and her son-in-law, Roy Clements, left in the appellant's pickup truck. They were gone for about an hour and when they returned to the apartment they said, "there were three men drove up over there in a yellow car." Thrasher testified that the appellant and her son-in-law remained at the apartment about two and one-half hours and then "they went back."

According to Thrasher, she and her daughter remained at the apartment about two and one-half hours then left and

went to a store. She stated they left the store and went to the house trailer that she and the appellant had occupied. On their arrival she saw the appellant and Clements. Sitting on the table in the trailer were a long billfold and a brown purse. She related that there was about eighty dollars in the billfold and that the appellant said there was about three hundred dollars in checks in it also. Thrasher added that the appellant gave her two twenty-dollar bills and gave her daughter, Debbie, the rest and placed the checks in the purse.

Beck told her to get him a pair of bluejeans and at that point changed clothes. The appellant then took the clothing that he was wearing outside of the trailer, placed it in a barrel and then set it on fire after pouring gasoline on it.

Thrasher recalled that before Beck changed his clothing he was wearing a pair of bluejeans, white tee-shirt, a green army jacket and a pair of black boots. Further, she said that she had seen blood on the clothing.

She also said that the appellant had stated that they had been at "that old man's house."

According to Thrasher, after the appellant changed his clothing, he placed the purse and the billfold in a paper sack. They then got in her daughter's car and drove down to the foot of the mountain. About half-way down the mountain they turned around, went back up, got out, and threw the sack, containing the purse and the billfold, over the side of a cliff.

Afterwards, she said they drove by the old man's house and there were lots of cars there. At that point, Thrasher said that her daughter started screaming and that she started crying. They returned to their house-trailer and her daughter and son-in-law left and went home. She said that she and the appellant had been at the trailer for about twenty minutes when the investigators arrived. They arrested Beck and she and Beck were taken to the Etowah County Courthouse. Further, she said that the officers had taken the boots that Beck had been wearing. She identified the boots during the trial.

On cross-examination, Thrasher admitted she had a conversation with the appellant's sister, Elizabeth Lane, at the courthouse on the day of the trial. She said that she told the appellant's sister, "I told her I didn't believe he did it

by himself." She denied saying that she knew that Gilbert Beck did not kill Mr. Roy Malone.

Upon further cross-examination, she denied making the statement in the presence of appellant's brother, Billy Beck, that, "if Gilbert Beck says that I helped plan this thing that I'm going to put a few lies on him." Further, she denied ever mentioning to Gilbert Beck that the victim, Mr. Roy Malone, had any money.

Thrasher also stated that she had seen blood on the boots and during the trial she pointed out the location on the boots where she had seen the blood. Further, she said that she did not know in which pocket the appellant carried the "whet rock" but that she had seen it in one of his bluejean pockets. Thrasher revealed that it was her aunt that was living in the house with the victim, Mr. Malone.

Deborah Ann Clements testified that she was Mary Ann Thrasher's daughter and that she was married to Roy Frank Clements. She said that she had known Gilbert Beck, the appellant, about two years, having first met him in Florida.

According to Clements, on November 8, 1976, her mother and the appellant, Beck, came to her house between 11:00 A.M. and lunch time. She recalled overhearing someone say the word, "rob." She remembered that her husband and the appellant, Gilbert Beck, left about lunch time and returned around 2:00 P.M. Around 2:30 P.M., they left a second time and she next saw the two at the trailer where her mother and the appellant lived.

Clements testified that as they walked into the trailer she noticed a lady's purse and a man's billfold on the table. She said that as she walked over to the table, the appellant mentioned the words, "we did it." She then looked into the brown purse and saw a brown envelope bearing the name, "Dora Mae Ford." She testified that she saw the appellant with some money and that he gave her mother half of it and her husband the other half.

Clements also recalled that she saw the appellant take a green shirt that was lying on the couch and throw it in a barrel which was emitting smoke. The four of them left in her husband's car and drove down the mountain where the appellant got out and threw the sack, containing the purse and the billfold, down the mountain.

According to Clements, they left the mountain and drove

to the Shady Grove community. When they neared the Malone house they saw police cars parked in the yard. It was then that she and her mother started crying. After leaving the vicinity of the Malone house they returned to her mother's trailer where they remained for a few minutes; then she, her husband, and their little girl went home.

During cross-examination, Clements testified that she did not see the appellant, Beck, sharpen a knife. Clements also said that she did not hear anyone say that they were going to rob the old man. She denied riding in the car with her mother to the Shady Grove community when her husband and the appellant, Beck, left the second time. On further cross-examination, she said that she had seen the name, "Dora Mae Ford," on a check in the lady's purse. She testified that Dora Mae Ford was her great-aunt, and she admitted that she had "guessed" there had been a robbery. She said that she saw blood on the appellant's pants and shoes.

Clements recalled that, when they returned to their apartment from her mother's trailer, some men came after her husband and took him to the courthouse. She stated that later that night she saw her husband at the county courthouse. It was while she was there that she gave a statement to the authorities. Afterwards, she said, when her mother had completed giving her statement, she and her mother left and went home.

Bill Bragg, the coroner for Etowah County, testified that he first observed the body of the victim, Mr. Malone, at his residence. He stated that he was dead at the time and that it was his opinion that the cause of death was massive hemorrhage due to what he described as a "gaping wound to the neck." He said that it was undoubtedly inflicted by some type of knife. Further, he said the wound, which was deep enough to sever the main arteries in the neck, went from the ear past the middle sector of the neck.

Bragg stated that the body was removed by Carr Funeral Home and that he saw it again the next morning at the funeral home. Further, he testified that he had instructed the funeral home not to "do anything to the body" until it was transported to Auburn. Bragg indicated that the body was transported to Auburn where it was turned over to Mr. Van Pruett.

During cross-examination, Bragg said that it was his opinion that the wound was on the left side of the victim's neck.

Eddie Lloyd Cox was called by the State and testified that on November 8, 1976, he was working with the Etowah County Sheriff's Department. He stated that on that date, he went to the victim's home about 5:28 P.M., and made photographs depicting the body of the victim. He identified State's Exhibits 1, 2 and 3, as those pictures he had made of the victim on that occasion.

Van Pruett, Jr., was a State Toxicologist on November 8, 1976, and he testified that on November 9, 1976, he saw the body of the victim, Mr. Roy Malone, at the morgue at Auburn, Alabama. He stated that the body had been delivered by Mr. Ralph Phillips, a medical examiner field agent, affiliated with "our department and the Etowah Coroner, Bill Bragg."

Pruett testified that his examination of the body revealed, "an incised wound measuring five and one half inches in its length circling the right side of the neck commencing under and slightly back of the corner of the mandible, which is the corner of the jaw, and extending forward to the midline of the neck." He said this "incised wound ranged through the lateral musculature of the neck, the major muscles on the neck and the jugular vein was severed." Pruett stated that it was his opinion that death was caused by "massive hemorrhage from the severing of the left jugular vein and the left branch of the common carotid artery."

Pruett removed two vials of blood from the body of Malone, labeled, sealed and prepared them for transmittal to the Jacksonville laboratory. Pruett said the vials were then turned over to Mr. Ralph Phillips.

During cross-examination, Pruett stated that the body he examined at the morgue was identified to him by Bragg and Phillips as being the body of Malone. Further, he said that the wounds he observed on the body of Malone were sustained while the person was alive. On further questioning, Pruett said he could not say whether or not the person who had inflicted this wound on the victim was standing in front of the victim or behind him.

Ralph Phillips testified that he was employed by the State Department of Toxicology as a medical examiner field agent.

He stated that he assisted the coroners and he carried bodies to Auburn in the event an autopsy was needed. Phillips said that on November 9, 1976, around 8:00 P.M. he went to the Carr Funeral Home and picked up a body. The body was identified to him as being that of Malone and he carried it to the morgue in Auburn where it was turned over to Mr. Pruett.

Phillips said that, after the autopsy was finished, Mr. Pruett returned the clothing that had been on the body and also gave him two vials identified as containing blood from the body. Phillips stated he carried the vials to the Jacksonville laboratory and turned them over to Mr. John Case.

John M. Case, employed by the Alabama Department of Toxicology and Criminal Investigation in Jacksonville, Alabama, testified that on November 10, 1976, Investigator Roy McDowell turned a billfold over to him. He said he examined the billfold and found several stains which he identified as human blood. During the trial he identified State's Exhibit No. 6 as that billfold.

Case also stated that on November 10, 1976, he received two vials of blood from Ralph Phillips and that the blood was identified as that of Roy Malone. Case said the blood was examined and found to be "Group O, human blood." Further, he said he could not say that the blood found on the billfold was "Group O," but could only say that the analysis showed that it was, in fact, human blood.

Case said that, while he was at the sheriff's office in Etowah County, McDowell turned over to him a pair of boots. He stated that he examined the boots for blood stains and found some stains on the left boot near the toe. He said several of these stains were examined and found to react characteristically as "Group O blood."

During cross-examination, Case acknowledged that the majority of people have "O Type Blood."

Case said that there were at least six spots on the boots and were an eighth of an inch to a quarter of an inch each.

Case was not asked to develop any fingerprints on the boots or lady's purse, nor was he asked to examine the purse. On further examination, he admitted that the sheriff's department of Etowah County, turned over to him certain clothes belonging to Roy Clements. He stated that he had

examined the clothing and found traces of human blood, "Type O."

At the end of the State's presentation of evidence the defendant called Vernon Sash as a character witness to testify to the appellant's good general reputation. In addition to Mr. Sash, the appellant called his sister, Mrs. Elizabeth Lane. She testified that Mary Ann Thrasher, during the course of the trial, but outside the courtroom, made statements implicating herself and expressing her belief that Gilbert Beck did not kill Roy Malone. Further, Mrs. Lane, in her testimony, indicated that Mary Ann Thrasher had great influence over her brother, the appellant.

William T. Beck, appellant's brother, said that during the trial he overheard Mary Ann Thrasher, while outside the courtroom, remark that she "planned to do some lying," when she was called to testify, because she felt she was being implicated in the case.

Gilbert Beck took the stand in his own behalf and testified that he came to Alabama in June of 1976, for the first time in his life, and returned to Alabama around September, 1976, at the insistence of Mary Ann Thrasher. Beck said that Thrasher continuously talked about large sums of money located at the home of Roy Malone.

According to Beck, on November 8, 1976, he and Roy Clements traveled to the home of Malone on two occasions. He stated that he and Clements planned to go to the home, tie up Malone and take the large sum of money that Mary Ann Thrasher had insisted was kept in the house.

Beck testified that during the course of the struggle with Malone, while he was attempting to tie him, Clements approached and attacked Malone with a knife. Beck said that, after Clements attacked Malone, he immediately left the Malone house and went to the truck and waited for Clements. He recalled that Clements joined him shortly and was carrying a woman's purse and a man's billfold.

Beck said that the money found in the billfold and the purse was divided and the purse and billfold were later thrown over a high bluff located in the area.

Beck insisted that he did not harm Roy Malone or remove anything from the house.

During cross-examination, Beck identified a letter that he had written to Mary Ann Thrasher while he was in the

Etowah County Jail, which stated in essence that she was in no way implicated in Malone's death and that, if he (Beck) said that she was, he would be lying.

Beck testified that the victim, Malone, was approximately six feet tall and weighed around two-hundred pounds. According to Beck, after he grabbed Malone, and the victim went down to his knees, Malone hollered for "Aunt Mae to get the gun."

According to Beck, Malone was on his hands and knees at the time Clements cut his throat. Beck said that he was holding Malone around the waist when Clements cut him. Beck stated that, although he had been a carpenter, he did not have a knife on that occasion.

Beck denied making any plans to rob Mr. Malone but stated that Clements and Mary Ann Thrasher "always talked about planning a robbery." He admitted that they had planned to rob Malone on that first trip to his house, but added that he did not intend to hurt, harm or kill anyone. He also admitted that there was an agreement among Clements, Thrasher, and himself to rob Mr. Malone and that the money was to be split "fifty-fifty."

During further questioning, he said that they had remained in the Malone house for some forty-five minutes but added that he did not go in any part of the house other than the kitchen.

He admitted burning the pair of bluejeans and the green shirt that he had had on, stating that each piece of clothing had a drop of blood on it.

At the end of appellant's testimony, the defendant called the circuit clerk of Etowah County who testified that Roy Frank Clements was indicted and charged with the robbery and murder of Roy Malone.

Thomas Earl James who next called and testified that Mary Ann Thrasher was his first cousin and that her general reputation in the community for truth and veracity was bad. At the end of James' testimony, the defendant rested its case, and after recalling the victim's son, Ted Malone, the State also rested.

Upon this evidence the jury determined the defendant to be guilty as charged and fixed his punishment at death.

After receiving the jury's verdict, the court set July 20th

as the date for the aggravating and mitigating circumstances.

On July 29, 1977, the court in accordance with Alabama's new death penalty act; Act No. 213, Acts of Alabama 1975, § 2(b); § 13-11-2, Code of Alabama 1975; T. 15, § 342(4), Code of Alabama 1940, Recompiled 1958, 1975 Interim Supplement, conducted the sentencing phase of the bifurcated capital sentencing scheme.

During the hearing, the appellant was present, being represented by each of his trial counselors and the State was represented by the district attorney of the county circuit.

The only testimony presented by the State came from the Etowah County Sheriff. During his testimony, the sheriff stated that it was his opinion that the offense with which the appellant was charged "was one of the worst cases that I have ever helped investigate."

During cross-examination, the sheriff stated that the appellant did not have a "record."

At the completion of the sheriff's testimony the State ended its presentation of evidence at the sentencing hearing. The court, at that time, took judicial notice of the testimony that came out during the trial and stated that it would consider an investigation report by the Department of Probation and Parole, along with a written report dated February 23, 1977, prepared by Dr. J. Stephen Ziegler, a Ph.D. in clinical psychology.

At that point, the appellant was called in his own behalf and his testimony was primarily the same as it was during the trial, where he stated that he did not intend to kill anyone or take anything from anyone and that Mary Ann Thrasher had unduly influenced his actions. In addition to the appellant's testimony the two officers were called in his behalf, and were questioned on matters that were not of a mitigating nature.

Also called by the appellant at this proceeding, was his sister, Elizabeth Lane, and his father, J. L. Beck. Each gave testimony concerning the extent of Mary Ann Thrasher's influence over the appellant and further testified that the appellant had never been involved in any other criminal offense.

At the end of the foregoing testimony, the court heard arguments from the State and appellant's counsel.

It was at that time that the court made the following findings before sentencing the appellant to death:

"The Court: Let the record show that the Court does not consider that, Only—the Court today is only considering aggravating and mitigating circumstances as to the guilt or innocence as has already been determined by the jury.

"Gentlemen, after hearing the trial of the case, hearing the evidence presented on this hearing of aggravating and mitigating circumstances and the arguments of attorneys, and all being duly considered, the Court finds that in aggravating circumstances: That a capital felony was committed while the Defendant was engaged or was an accomplice in the commission of robbery. That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, in the fact that the only two people at the house at the time the offense was committed were murdered. That the capital felony was committed for pecuniary gain. The capital felony was especially heinous, atrocious or cruel as under 342(4)(j) where murder in the first degree where-in [sic] two or more human beings are intentionally killed by the Defendant by one or a series of acts.

"As for the mitigating circumstances of the Defendant, I find that the Defendant has no significant history of prior criminal activities. That is the Court's findings.

. . . .

"The Court: Gilbert Franklin Beck, it is the sentence of the Court, and I pronounce it upon you, that you be put to death. . . .

. . . .

"Since this is an automatic appeal let the record show that the sentence is ordered suspended pending the outcome of the decision of the appellate court's—final determination by the appellate courts."

I

Appellant contends it was error to dismiss the motion to quash the indictment filed against him. It is strenuously

argued that the indictment was fatally defective because all the grand jurors who were summoned were not afforded the opportunity to hear the evidence presented to them in the grand jury room. Appellant maintains that all should have had the opportunity to join in the deliberations with their fellow-jurors. Counsel insists that the opportunity to deliberate and vote cannot be abrogated.

A hearing on the motion to quash was held and the testimony elicited at that time established the following facts:

On November 24, 1976, a special grand jury was convened before Circuit Judge Cunningham. According to one witness, who had been a member of that grand jury, one of the grand jurors was late and arrived after the evidence had been presented.

James Craig Reynolds testified that he had been summoned to serve on the grand jury and that the subpoena directed him to be present at 10:00 A. M., on November 24, 1976. When he arrived he was taken into the district attorney's office and shown the evidence that had been presented to the other jurors. According to Reynolds, he reviewed the evidence outside the grand jury room with another member of the grand jury, Joy Taylor.

Reynolds said that no vote had been taken by the grand jury before he arrived. He stated that after his arrival they considered no evidence other than that which he had already seen. Reynolds testified that to the best of his knowledge the rest of the grand jury members were present.

Mary Wiggins Raley, another member of the special grand jury recalled that when she arrived at 9:00 A. M. on November 24, 1976, fifteen members of the grand jury were present. Further, she stated "two came in a little late and heard the evidence and then one came in too late to hear it."

Raley testified that none of the late arrivals voted in the proceedings. From the record we read:

. . . .

"Q. Did the one that come [sic] in too late to hear it, did he vote also?

"A. Oh, no. We had already gone back in.

"Q. Well, let me ask you. Did the two that come [sic] in a little late, did they cast a vote?

"A. No.

"Q. Do you know whether or not they did?

"A. Yes, I know. They were out of the room reading the evidence that we had presented to us and while they were out we counted the number of people there and said well, let's see if we can nake a vote, and we voted before they come [sic] back in.

"Q. Did you count Mr. Rayburn in that fifteen?

"A. He wasn't in there.

. . . .

"Q. These people who went out in the hall and looked at some stuff, did they ever have any discussion about whether to indict Mr. Beck or not or have any imput into it at all?

"A. I don't suppose they did. The voting was done before they came back in.

. . . .

"THE COURT: I have a question. Mrs. Raley, you said the voting was done before those two others that came in late came in?

"A. While they were in the other room reading the evidence the foreman of the jury looked around and said 'well, there is [sic] fifteen of us here. Let's see if we can get twelve to vote for a true bill.' And we got a unanimous vote.

"THE COURT: So those people who were late did not participate?

"A. No."

Further, Raley stated that when the latecomers came back in, the foreman informed them that they had voted for a true bill and asked if they would like to vote against it, and if so, another vote would be taken. At that point they stated they were in agreement with what the other members of the grand jury had done.

At common law, a grand jury was composed of not less than twelve nor more than twenty-three duly qualified men. It was their duty to inquire into charges of crime or misdemeanor and decide from the evidence whether prima facie ground for criminal accusation existed. *State v. Bramlett,* 116 South Carolina, 323, 164 S. E. 873; *State v. Boske,* 107 North Carolina, 913, 12 S. E. 115.

In most jurisdictions, however, the number of grand jurors is fixed by statute or constitutional provision. In this State, the grand jury consists of eighteen. T. 30, § 38, Code of Alabama 1940, Recompiled 1958; § 12-16-74, 1975 Code of Alabama.

The only other provisions in relating to the number of grand jurors appear in T. 30, §§ 41, 89 and 93, Code of Alabama 1940, Recompiled 1958; §§ 12-16-76, 12-16-204 and 12-16-207, Code of Alabama 1975.

Section 41 provides that if in the event the grand jury, for any reason, is reduced "below the number required by law the court shall in the manner prescribed in this chapter, supply all deficiencies."

In *Hafley v. State,* 8 Ala. App. 378, 360 So. 319 (1913), it was held that this statute does not require that the number (18) of the jury as organized must be maintained to constitute a legal grand jury. There it held that a lesser number would suffice so long as it was at least the minimum set by law. The court said the number below which a grand jury cannot be reduced is not fixed by the jury law passed in 1909, but by § 7283 of the Code, which authorized deficiencies to be supplied only when the number was reduced below fifteen. *Hafley v. State,* supra; *Patterson v. State,* 171 Ala. 2, 54 So. 696. See *Moore v. State,* 9 Ala. App. 672, 62 So. 320.

Section 7283 was deleted from the 1923 Code of Alabama and has not reappeared in any subsequent Codes, including the 1958 recompilation of the 1940 Code of Alabama.

Section 89 of T. 30 provides that the "concurrence of at least twelve jurors is necessary to file an indictment." Section 12-16-204, Code of Alabama 1975.

Section 93 of T. 30, mandates that should the number of grand jurors be reduced below thirteen because of the operation of § 92 of T. 30, the court shall supply the deficiency. Section 92 requires withdrawal of a grand juror if that juror has some interest in the investigation due to his being charged with the offense under investigation; or if he has been the victim of an offense under investigation; or if he is a prosecutor; or is related by blood or marriage to the person charged. In the event that such a deficiency exists, the court must supply enough grand jurors to fill a box with thirteen or more.

Under the Constitution of the United States, no requirement exists that a grand jury shall be organized with the same number of jurors as at common law. *Talton v. Mayes,* 163 U. S. 376, 16 S. Ct. 986.

In *State v. Miller,* 3 Ala. 343, the court held that it was essential to the validity of an indictment that twelve grand jurors concur in the finding of a true bill. This portion of

the law has been codified in § 89, Code of Alabama 1940, Recompiled 1958, § 12-16-204, Code of Alabama 1975. See *Smith v. State,* 142 Ala. 14, 39 So. 329 (1904); *Tate v. State,* 26 Ala. App. 411, 161 So. 456 (1935).

Although there was a conflict in the testimony as to the number of grand jurors in attendance, it was not disputed that at least fifteen were present. Even under the 1907 Code there would have been a sufficient number present to constitute a legal grand jury.

Under our present Code, there is no doubt that the grand jury was duly empowered to return an indictment, although there may have been, at the most, three who did not participate in the deliberation and vote. Even though eighteen grand jurors were summoned, our Code and case law only requires the concurrence of twelve to return a valid indictment. There was no error in denying the appellant's motion to quash.

II

The appellant next contends that the Alabama death penalty statute, Act No. 213, Acts of Alabama, 1975, Code of Alabama, 1975, §§ 13-11-1 through 13-11-10, does not comply with the constitutional demands of the Eighth and Fourteenth Amendments.

In support of this contention, the appellant has submitted several arguments which we have summarized in the following paragraphs and will discuss in the order of their appearance.

A. The trial or petit jury is not allowed to consider mitigating or aggravating circumstances in the case.

B. The grand jury alone, under the influence of the district attorney of a county, makes the determination of the existence of any aggravating circumstances, and it is from the district attorney that the grand jury hears evidence of aggravating circumstances.

The appellant insists that this is a one-sided presentation of evidence and the "chilling fact is that the local district attorney alone makes the decision to try a defendant under the new death penalty act." The appellant maintains that to deny him a right to testify, and to cross-examine witnesses of his own, is a denial of due process.

C. The trial jury cannot be instructed on lesser included offenses.

In the absence of such a provision, the appellant insists that the only choice that a petit jury has is imposing death or acquitting the defendant. He states that because only those two choices are presented to the jury, the statute can only be interpreted as having a mandatory death provision.

D. The conduct of the post trial hearing on aggravating and mitigating circumstances by the trial judge places upon him a tremendous burden in that the jury has imposed the death sentence in a widely publicized case.

It is argued that this places a burden on the trial judge that he cannot ignore.

Appellant insists that the Alabama death penalty statute is mandatory in that it fails to meet the test of allowing any discretion on the part of the jury before imposing sentence. The appellant cites *Jurek v. Texas,* 428 U. S. —, 96 S. Ct. 2950, 49 L. Ed. 2d 929, and states:

> "A jury must be allowed to consider on the basis of all relevant elements not only why a death penalty should be imposed, but also why it should not."

F. Appellant insists that, if, in fact, the jury's verdict is advisory only, the appellant's right to a trial by jury would still be abridged because the jury's function would be relegated to that of only a finder of fact with no part in the sentencing process.

As to contention "A", jury sentencing in capital cases has never been suggested by the Supreme Court of the United States as being constitutionally required. *Proffitt v. Florida,* 428 U. S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913; *Jacobs v. State,* Ala. Crim. App., — So. 2d —, 6 Div. 389, Court of Criminal Appeals Ms. (July 26, 1977. In summary, what Jacobs quoted *Proffitt* as saying was that sentencing by a trial judge in capital punishment cases would lead to more uniformity and consistency because a judge was more experienced in sentencing than a jury. Further, he is better able to impose similar sentences to those imposed in prior analagous cases.

The Alabama death penalty statute, supra, provides for sentence of death involving murder with aggravation. With this guidance we cannot accept assertion "B" that district

attorneys of this State will systematically fail to file capital murder charges, when the evidence warrants it, or seek convictions on inadequate evidence.

Someone must exercise this discretion and judgment as to what charges are to be filed and against whom. This is part of our criminal justice system and is essential to its operation and enforcement. The discretion reposing in Alabama's district attorneys is no more than that invested in other prosecutors across this country. It furnishes no basis for inferring that capital crimes will be prosecuted on an arbitrary and capricious basis. Also, that capital murders will be prosecuted so frequently and arbitrarily that our death penalty statute would be void under *Furman v. Georgia,* 408 U. S. 238, 92 S. Ct. 2126, 33 L. Ed. 2d 346, is an invalid assumption.

Denying this appellant access to the grand jury proceedings in the disallowing the presentation of defense witnesses, along with the cross-examination of the State witnesses, is not an abridgment of his due process right. *Costello v. U. S.,* 350 U. S. 359, 76 S. Ct. 406.

Contention "C", that Alabama's new death penalty act involves a mandatory death provision was treated specifically in *Jacobs v. State,* supra. There, Judge Harris writing for a unanimous court, stated:

> "The jury's function is only to find guilt or innocence. The jury is not the sentencing authority. . . . the verdict of the jury is advisory only as the law compels the trial judge to hold a separate hearing to consider aggravating and mitigating circumstances. . ."

Appellant's argument "D" is also unacceptable. The Alabama capital sentencing procedure is determined by the trial judge, which is discussed in the preceding paragraph. Nonetheless, this sentencing phase of Alabama's bifurcated capital murder trial method seeks to assure that the death penalty will not be imposed in an arbitrary and capricious manner. This has also been minimized by Alabama's appellate review system under which the evidence of aggravating and mitigating circumstances is reviewed and reweighed, not only by the court of Criminal Appeals of Alabama, but by the Supreme Court of Alabama. The Supreme Court of Alabama has never displayed any reluc-

tance or temerity in reversing a death sentence. Their history has shown that some twenty-five death cases have been reversed for various reasons. See *Jacobs v. State,* supra.

Under the new Alabama death penalty statute, the defendant has a second chance for life with the trial judge, a third with Court of Criminal Appeals, and a fourth with the Supreme Court of Alabama. Not only are the decisions of the trial judge in death cases reviewed to insure a fair and impartial trial, but they will insure consistency and uniformity of sentencing.

The capital sentencing scheme enacted by the Alabama legislature has set down a detailed guide to assist trial judges in deciding whether to impose the death sentence or imprisonment for life without parole. This reduces any risk that a sentence of death will be imposed in an arbitrary and capricious manner. *Jacobs v. State,* supra.

Further, in contention "E", the appellant has argued that the Alabama statute is mandatory in that it fails to meet the test of allowing any discretion on the part of the jury before sentence is imposed. The appellant has cited *Jurek v. Texas,* supra, for support. Under the sentencing system established by Alabama's new death penalty law, not only are aggravating circumstances considered, but mitigating circumstances are also taken into consideration by the trial judge. This provides "individualized sentencing determination."

Alabama's new death penalty law specifically directs that once a jury has found a defendant guilty of one of the aggravated offenses listed and has fixed punishment at death, the court must hold a hearing before sentencing the defendant. Act No. 213, Acts 1975, § 3, now, § 13-11-3 of the 1975 Code of Alabama, provides:

> ". . . In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided

further, that this section shall not be construed to authorize introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted present argument for or against the sentence of death."

Under Alabama's death penalty law, the trial judge is directed to consider "the particularized mitigating factors" set out in the act. However, along with this safeguard, the Alabama death penalty act goes one step further and provides the trial judge with the discretion of allowing "any such evidence which the court deems to have probative value." In short, the sentencing authority of Alabama's bifurcated capital sentencing system is given adequate information and guidance in imposing the death sentence by a carefully drafted statute.

The capital sentencing system used in Alabama meets "Furman's constitutional concern."

"Furman held only that in order to minimize the risk of the death penalty being imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." *Gregg v. Georgia,* 428 U. S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859.

It is contended in argument "F" that the constitutional guaranty of a trial by jury as afforded by the Constitution of the United States and the State of Alabama, has been abridged by the Alabama death penalty statute. Counsel argues that the appellant has not had a trial by jury because the sentencing phase is conducted by the trial judge. Counsel also maintains that the appellant's right to a trial by a jury has been violated in that the inquiry of the jury has been limited and it has not had the opportunity to examine all the law and facts in the case.

The plurality opinions in *Gregg v. Georgia,* supra; *Proffitt v. Florida,* supra, and *Jurek v. Texas,* supra, held that in any capital sentencing procedure there must be a provision under which the "sentencer could separately consider the character and record of the individual defendant, along with the particular circumstances of the offense, including

any mitigating circumstances existing." The Alabama death penalty statute has made such provisions.

Nowhere in any of the capital cases considered by the Supreme Court of the United States is there any indication that it was constitutionally impermissible for a trial judge to determine the sentence in a death case. On the contrary, in *Proffitt v. Florida,* supra, the court specifically spoke to this point and approved judicial sentencing.

In *Gregg v. Georgia,* supra, the Supreme Court stated that the constitutional concerns expressed in *Furman,* supra, that a penalty of death might be imposed in an arbitrary or capricious manner, could be alleviated when a death statute directs the sentencing authority with adequate information and guidance. Although the Supreme Court in *Gregg v. Georgia,* supra, stated these concerns might be best supplied by a system that provides for a bifurcated proceeding, the court went on to say that this was not the only procedure permissible under *Furman,* supra.

Under the Alabama death penalty statute, the question of sentence is not considered until the determination of guilt has been made. At that time the trial judge becomes the sentencing authority and uses his experience as a trial judge in applying the mandates of the capital murder statute in assessing and determining the aggravating and mitigating circumstances of the offense. An experienced trial judge is in a better position to face the difficult task of imposing a death sentence because he daily faces the problem of assessing information concerning a defendant who is charged with a crime. He is accustomed to using sentencing information provided by the probation officers in our pardon and parole system.

In none of the cases involving death sentences that the Supreme Court of the United States has considered, does it state that the sentencing authority must be in the hands of a jury. The decisions in *Gregg v. Georgia,* supra; *Proffitt v. Florida,* supra, and *Jurek v. Texas,* supra, merely state that a bifurcated proceeding is the best method for meeting the constitutional concerns of *Furman,* supra.

In *Proffitt v. Florida,* supra, the Supreme Court stated:

"The requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in

favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition."

The directions given the Alabama trial judge as the sentencing authority are more than adequate to enable him to weigh the aggravating circumstances against the mitigating ones. Thus, the trial court's sentencing discretion is "guided and channeled" by a system that focuses on the circumstances of each individual, and the circumstances of the offense itself in deciding whether the death penalty is to be imposed.

Once a sentence is imposed, the sentencing judge must set forth in writing the statutory reasons that led him to his decision. These reasons, along with the entire record and transcript, are reviewed, not only by the Court of Criminal Appeals of Alabama, but the Supreme Court of Alabama as well.

In view of the foregoing authority, it is our judgment that the appellant's right to a trial by a jury has not been abridged under Alabama capital sentencing procedure.

IV

It is insisted that the sentencing procedure conducted by the court after the jury's determination of guilt violated due process in that the appellant was required to prove mitigating circumstances.

The appellant relies on *Gardner v. Florida,* 97 S. Ct. 1197, 51 L. Ed. 2d 393, for support of his contention. However, *Gardner v. Florida,* supra, can be distinguished. There, the Supreme Court in vacating a death sentence, stated that a defendant facing such a sentence, who was not informed of the contents of a pre-sentence investigation report made to the sentencing judge, was denied his due process rights. The Supreme Court's condemnation arose, not from the fact that the appellant had the duty to prove mitigating circumstances in order to counter-act the existence of aggravating circumstances, but due to the fact of non disclosure of the pre-sentencing investigation report.

The essence of due process is the opportunity to be heard:

"Due process of law implies the right of the person affected thereby to be present before the tribunal which

pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him this is not due process of law." *Zeigler v. South & North Ala. R.R. Company,* 58 Ala. 594.

Due process requires that a defendant enjoy a full opportunity to insure the factual accuracy of the information used to determine his sentence, by extending to him those same traditional means used to resolve factual issues. The right to be heard protects the appellant against an erroneous deprivation of life by giving him a chance to sharpen the issues and expose the inconsistencies and bias, so that the fact-finding process will be reliable. Under Alabama's new death penalty statute, the appellant is given an opportunity to be heard and is accorded a fair opportunity to rebut any evidence.

The fact in issue to be determined by the trial judge is whether the appellant will suffer death.

In an abundance of caution, the Alabama death penalty statute mandates a full evidentiary hearing with the formal submission of evidence subject to the restriction only of disallowing evidence in violation of the Constitution of the United States and the State of Alabama. Evidence submitted at the sentencing hearing is not governed by the exclusionary rules of evidence.

Once the appellant is afforded the rights to present witnesses, documentary evidence, and to confront and cross-examine witnesses, the due process requirements of the Constitutions have been met. He may, or may not, avail himself of that opportunity, but due process requires that he be afforded that opportunity.

In the present case, the new Alabama death penalty statute more than adequately meets due process requirements.

The appellant insists that the trial court erred when, during its oral charge to the jury it gave the following instruction:

"If he is acquitted in the case, he can never be tried for anything he did to Roy Malone."

In our search and examination of the record, we find nothing to indicate that an exception was taken to this portion of the court's oral charge and, in the absence of such an exception, the error is not preserved.

This specific point was discussed by Presiding Judge Harris in *Jerry Wayne Jacobs v. State,* supra. where he stated:

"It has been firmly established by both this court and the Supreme Court of Alabama, that in the absence of an exception to the court's oral charge, nothing is presented for review on appeal. The rule applies with equal force under our Automatic Appeal Statute in death cases. T. 15, § 383(1) et seq. Code of Alabama 1940, Recompiled 1958; Richardson v. State, 57 Ala. App. 24, 325 So. 2d 540; Hearn v. State, 56 Ala. App. 301, 321 So. 2d 267; Cox v. State, 286 Ala. 318, 193 So. 2d 719; Hubbard v. State, 283 Ala. 183, 215 So. 2d 261 (Death case); Knight v. State, 273 Ala. 480, 142 So. 2d 899 (Death case—reversed on other grounds)."

We note that the Alabama death penalty statute, Act No. 213, Acts 1975, § 3, now, § 13-11-2 of the 1975 Code of Alabama, states

". . . [I]f the jury finds the defendant not guilty, the defendant must be discharged."

In our reading of the foregoing portion of the Alabama death penalty statute, we are convinced that the court's instruction was proper in view of the wording of the statute.

Nonetheless, in the absence of an exception, nothing is presented for review.

VI

Finally, the appellant alleges that the Alabama death penalty statute is unconstitutional under the Alabama Constitution of 1901, specifically violating Article III, § 43, Article V, § 124, and Amendment 38, of the 1901 Constitution of Alabama.

Article III, § 43 reads:

"In the government of this State, except in the instances in this Constitution hereinafter . . . directed . . . , the

legislative department shall never exercise the executive and judicial powers . . . the executive shall never exercise the legislative and judical powers . . . the judicial shall never exercise the legislative and executive powers . . . to the end that it may be a government of laws and not of man."

Article V, § 124 reads:

"The governor shall have the power . . . to grant reprieves, paroles, commutations of sentence, and pardons. . . . The attorney general, secretary of state, and state auditor shall constitute a board of pardons, who shall meet on the call of the governor and before whom shall be laid all recommendations or petitions, for pardon, commutation, or parole, in cases of felony; and the board shall . . . give their opinion to the governor . . . (who) may grant or refuse the commutation, parole or pardon, as to him seems best . . ."

Amendment No. 38, to the above says that the governor has the power to grant reprieves and commutations to persons sentenced to die. The legislature has the power to control pardons and paroles and . . . may authorize courts having criminal jurisdiction to suspend sentence and to order probation.

The amendment was intended to grant to the legislature the power to provide for pardons and paroles and also to regulate their administration. *Summers v. State,* 244 Ala. 677, 15 So. 2d 502; *Holman v. State,* 43 Ala. App. 509, 193 So. 2d 770.

Under the amendment only the governor has the power to commute a death sentence. *Wilson v. State,* 268 Ala. 86, 105 So. 2d 66; *Uddell v. State,* 287 Ala. 299, 251 So. 2d 601; *Scott v. State,* 247 Ala. 62, 22 So. 2d 529.

Appellant cites *Montgomery v. State,* 231 Ala. 1, 163 So. 365, and avers that this decision was the impetus behind the enactment of Amendment 38. The validity of a statute conferring authority in the State courts with criminal jurisdiction the right to grant probation in certain situations was questioned. The Supreme Court ruled that this statute was violative of § 43 and of § 124. It was held that the legislature could not transfer to the judicial department those

powers vested in the executive branch, the constitution and the statute was unconstitutional.

Because of *Montgomery v. State,* supra, a constitutional amendment was required to transfer the power of pardon and parole out of the executive branch. This was done through Amendment 38, however, Amendment 38 did not affect the exclusive power of the governor to commute one's sentence of death.

In view of the foregoing, the appellant adamantly insists that before the judicial branch can commute a sentence, a constitutional amendment is required just as Amendment 38 was required after the decision in *Montgomery v. State,* supra.

The threshold question is whether there is in truth, and in fact, commutation in the Alabama death penalty statute. This would certainly be true if the trial judge, during the sentencing hearing, has a right to commute a sentence of death. If this were true, then it would be in violation of the Alabama Constitution.

In our judgment, no such right exists under the statute in question.

BLACK'S LAW DICTIONARY, 351 (4th ed. 1951), defines commutation as:

> "Alteration; change; substitution; the act of substituting one thing for another.
>
> "CRIMINAL LAW
>
> "The change of a punishment from a greater to less; of from hanging to imprisonment."

Further, the Alabama death penalty statute, Act No. 213, Acts 1975, §§ 3 and 4, T. 15. § 342(5), 342(6), 1975 Interim Supp., supra, now §§ 13-11-3, 13-11-4, of the 1975 Code of Alabama, specifically outlines the province of the jury during trial and the trial judge during the sentencing hearing. T. 15., § 342(5), 1975 Interim Supplement, supra, reads:

> "If the jury finds the defendant guilty and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole."

T. 15., § 342(6), 1975 Interim Supplement reads:

> "Determination of sentence by court, court not bound by punishment fixed by jury.
>
> "Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole . . . or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death."

Additionally, in *Jerry Wayne Jacobs v. State,* supra, this court also delineated the authority of the jury at trial and the judge at the sentence hearing, specifying the duty of each at the individual phases of the bifurcated trial.

The United States Supreme Court in *Proffitt v. Florida,* supra, pointed out that the jury verdict was advisory only, and that the actual sentencing was to be determined by the trial judge. The court went on to state that the trial judge was the sentencing authority. See *Dobbert v. Florida,* 432 U. S. 282.

In *Jacobs v. State,* supra, Judge Harris observed that the death penalty in Alabama was strikingly similar to the one upheld by the Supreme Court in *Proffitt v. Florida,* supra, Judge Harris commented:

> "The Death Penalty Act in Alabama is strikingly similar to the one upheld by the Supreme Court in Proffitt v. Florida, supra. In Florida, the jury decides first the guilt or innocence of the defendant. Then, in a separate hearing, the jury determines a sentence after considering and weighing statutorily defined aggravating and mitigating circumstances. Under Florida's system the sentence can be death or life imprisonment. However, the verdict of the jury is only advisory as the actual sentence is determined by the trial judge."

This excerpt from *Jacobs,* supra, clearly indicates the jury's function is advisory and its duty is to adjudicate guilt, whereas it is the province of the trial judge to determine the actual sentence.

According to the definition of commutation we come to the next question, that being, when does commutation occur? It is evident that only after one has been sentenced can there be a commutation.

Under our death penalty statute, the question of sentence is not considered until the determination of guilt is made by the jury at the guilt phase of the bifurcated hearing. Once the jury finds the defendant guilty of one of the aggravated offenses, it fixes the punishment at death. However, it is the trial judge, who, at a separate hearing, determines whether or not the defendant is to suffer death or life imprisonment without parole. The verdict of the jury is advisory only. No sentence exists until the pronouncement by the trial judge at the conclusion of the sentence hearing. It is for this reason the court cannot be said to be commuting a sentence of death imposed by the jury, but, in truth and in fact, it is sentencing the accused after a jury's finding of guilt.

We note, however, that once this sentence has been imposed by the trial judge at the sentencing hearing, it can be commuted by the governor of this State afterwards, at any time, even up to the time of execution.

In view of the foregoing, we are of the opinion that Alabama's new death penalty statute is constitutionally sound under both the United States and the Alabama Constitutions.

VII

After carefully reviewing and analyzing the record, briefs, and oral arguments of the parties, we find that no reversible error has been shown.

We have also considered the mitigating and aggravating circumstances and have found that under the facts of this case, death was the appropriate penalty.

The facts in this case, after a careful evaluation, show a marked similarity with those in *Jacobs v. State*, supra.

It seems to us that the result is inescapable that the punishment, too, should be the same.

Accordingly, no reversible error appearing, the judgment of conviction, and sentence of death is hereby affirmed.

AFFIRMED.

Harris, P.J., Tyson, Bowen, JJ., concur,
Bookout, J., concurs specially.

BOOKOUT, J., concurring specially:

Regardless of the mechanism for requiring the trial judge to consider aggravating and mitigating circumstances, there still seems to be a misinterpretation of certain of those circumstances by trial judges. This appears in two instances in this case:

(1) "That a capital felony was committed while the Defendant was engaged in . . . the commission of a robbery."

(2) "That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. . . ."

It is difficult to see how robbery can be the aggravating circumstance of robbery. The appellant here was charged under § 2(b) of Act No. 213, Acts of Alabama 1975. The offense is *robbery* when the victim is intentionally killed by the defendant. The basic offense is robbery, and the aggravating circumstance elevating it to a capital felony is the murder of the victim. Thus under § 2(b), supra, *robbery* cannot be assigned as the aggravating circumstance to elevate *robbery* to a capital felony.

Likewise, as in my concurring opinion in *Jacobs,* supra, I do not believe that the killing of the victim was for the purpose of "avoiding or preventing a *lawful* arrest *or effecting an escape from custody.*" To quote from that concurring opinion:

". . . That section speaks of avoiding or preventing a *lawful* arrest *or effecting an escape from custody.* That wording was added to the act to protect peace officers. It is to deter 'shoot outs' with arresting officers, or in escapes after arrests. The words 'lawful arrest' are

significant in that a person in Alabama may resist with force, an unlawful arrest. *Green v. State,* 238 Ala. 143, 189 So. 763 (1939). When coupled with the phrase referring to escapes from custody, it is apparent that the legislature was attempting to protect officers of the law rather than potential identification witnesses. If protecting potential witnesses was the intent of that section, the legislature would merely have said that killing a potential witness would be an aggravating circumstance."

However poorly Act No. 213, supra, is written, and subpect to misinterpretation in some areas, it nevertheless requires a finding of only one aggravating circumstance to uphold the death penalty pursuant to § 4(a). Here the trial judge properly found the aggravated robbery to have been (1) committed for pecuniary gain, and (2) was especially heinous, atrocious, or cruel. Finding that the record supports the trial court's finding of those latter two circumstances, I therefore concur in the instant opinion.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1978-79

Ex Parte: Gilbert Franklin Beck

PETITION FOR WRIT OF CERTIORARI
TO COURT OF CRIMINAL APPEALS

77-530

(Re: Gilbert Franklin Beck, alias

v.

State of Alabama)

Opinion—December 8, 1978

MADDOX, JUSTICE.

Petitioner Beck raises only one issue here:

"Whether the Alabama Court of Criminal Appeals erred in its finding that the Alabama Death Penalty Statute is not in violation of Article III, Section 43, Article V, Section 124 and Amendment 38, of the 1901 Constitution of Alabama."

Petitioner raised the same issue in the Court of Criminal Appeals, and that court decided the issue adversely to him. We affirm.

The sentencing procedure set out in Alabama's Death Penalty Statute is constitutional. *Jacobs v. State,* 361 So.2d 640 (Ala. 1978).

Petitioner raised in the Court of Criminal Appeals other alleged errors which he contended constituted prejudicial error. He does not ask us, in his petition for certiorari, to review the holding of the Court of Criminal Appeals on those issues; therefore, we do not address them. Rule 39, ARAP.

AFFIRMED.

Torbert, C.J., Bloodworth, Faulkner, Almon, Embry and Beatty, JJ., concur.

Jones and Shores, JJ., dissent.

JONES and SHORES, JJ., (Dissenting).

We adhere to the statements we expressed in *Jacobs* v. *State*, 361 So.2d 640 (Ala. 1978).

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 8 day of Dec. 1978

J. O. Sentell
Clerk, Supreme Court of Alabama

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

STATE OF ALABAMA,
Plaintiff
vs
GILBERT FRANKLIN BECK,
Defendant
} Case No. 12,747

MOTION TO QUASH—Filed June 10, 1977

Comes now the Defendant, Gilbert Franklin Beck, by and through his Attorneys, and moves to quash the indictment heretofore filed in this cause and for grounds set down and assigns the following:

1. That said indictment is contrary to the rights of the Defendant under the Constitution of the United States and the State of Alabama, in that the punishment prescribed for the offense, which said punishment is mandatory in nature, is cruel and inhuman punishment.

2. For that as the law is not constituted under Act No. 213 of the Regular Session of the 1975 Legislature, State of Alabama, the Defendant is not afforded sufficient opportunity to show mitigating circumstances since a jury can only give the Defendant a sentence of death and/or acquittal.

JAMES F. HINTON and LYNDOL BOLTON
ATTORNEYS FOR DEFENDANT

BY: James F. Hinton

Certificate of service (omitted in printing)

CIRCUIT COURT OF ETOWAH COUNTY

[Statment by Petitioner's Counsel]

THE COURT: All right. All right, do you want to take up another motion?

MR. BOLTON: Yes, sir, I want to pursue my Motion to Quash further.

THE COURT: All right.

MR. BOLTON: Your Honor, I don't want to take the Court's time up unnecessarily, but I would like to point out to the Court some things, and I know your Honor realizes the seriousness of it and I'm not trying to suggest to the Court or take the Court's time unduly, but I think everyone in this Courtroom is plowing new ground when it comes to Act Number 213 that was enacted in the regular session of the Legislature, 1975. I speak to this in my Motion to Quash the Indictment and I think that if there be an instrument by which I can test the Constitutionality of what is called the Death Penalty Statute it is by my Motion to Quash, and I believe that is the correct instrument and I think you will find that I pointed out to the Court that it violates the Eighth and it violates the Fourteenth Amendment to the Constitution of the United States. . . .

[39] [Testimony of Petitioner Beck on Direct Examination]

Q. Now, did you discuss what you were going to do relative to how you were going to—what you [587] were going to do to Mr. Malone and so forth to get his money?

A. We was to tie them up. Killing anyone, hurting anyone, harming anyone in anyway whatsoever had never been mentioned by no one. . . .

[588] Q. What did you and Roy Frank discuss about what you were going to do when you got there?

A. We was to tie them up and get the money out of the closet, if there was any in there, at which we had been told.

Q. What happened next?

A. Roy Frank Clements used the excuse to go to the bathroom. On the way—He didn't want to go to the bath-

room. He was to go back there and check on the closet where the money had been said was. He didn't even go to the bathroom as far as I know. He come back out of the bathroom, back into the kitchen where we was. He looked at me and give me the motion like that with his head. (Indicating) He nodded his head like that. Didn't say a word. He just nodded his head to me that everything was there like Mary Ann had told him that it was and that he was ready to make the robbery. I then, after he nodded to me, give me the motion that it was there and everything was ready, I then grabbed Mr. Malone. Me and Mr. Malone—I didn't hurt him. I hadn't hurt Mr. Malone no way whatsoever. I didn't intend to hurt him or nobody else as far as that goes. I never have.

Q. Just tell us what you did.

A. All right. After I grabbed Mr. Malone, me and Mr. Malone was down on the floor. I was behind Mr. Malone. Mr. Malone was down on his hands and [591] knees. I was behind him. I had him around his waist.

Q. What was you doing?

A. I was trying to reach for the rope and tie him up with.

Q. What happened next, if anything?

A. From that—while I was trying to reach for the rope and hold Mr. Malone at the same time, me and Mr. Malone was scuffling around on the floor and I was trying to get the rope to tie him up with. At that time Roy Frank Clements came up to Mr. Malone on the right side of the neck and facing Mr. Malone and whacked his neck on the right side of his neck.

Q. What did you do, if anything, at that time?

A. At that time I jumped up and I said, "Oh, my God, Roy." I said, "Why did you do that?"

MR. MARTIN: We object to that, your Honor.

Q. What did you do then, if anything?

MR. MARTIN: Listen, when I make an objection would you instruct counsel to wait for the ruling, your Honor?

THE COURT: Overrule your objection. You may proceed.

A. From the time that Roy Frank Clements cut Mr. Malone's throat and I jumped up and I said, "Oh, my God, Roy." I says, "Why did you do that?" I got up. I opened the door. I had to almost step over Mr. Malone,

step over his body lying on the floor. I had to step over it to go out [592] of the kitchen door. I went out of the house, taking nothing out of the house but myself. I went and got in my truck. I cranked up my truck and I was sitting there waiting for Roy Clements to come on and get out of that house and get in the truck and let's leave from there.

Q. How long was it after that did you see Roy Frank Clements?

A. Roy Frank Clements stayed in the house approximately three minutes—two to three minutes before he ever came out of the house. When he came out of the house he had the lady's purse and Mr. Malone's wallet in his hand.

Q. I show you this, and I'm not saying that you know for a fact it is, but does this wallet look similar to the wallet that he brought out there to the truck? (Handed)

A. That wallet there is similar to the wallet that Mr. Malone owned, but I wouldn't swear to that, that it's the same wallet. It's one similar to it.

Q. Well, you wouldn't say it was not either, would you?

A. No, I would not. I wouldn't say that it is. I wouldn't say that it wasn't.

Q. Did you ever take a dime out of his wallet?

A. No, I have not.

Q. Do you either know whether Roy Frank Clements took a dime out of it or not?

[593] **A.** No, I don't.

Q. Now, tell us when you got back to the truck, what you did, if anything, from that point?

A. From that point?

Q. First let me ask you, did you cut or kill anybody?

A. No, I did not.

Q. Did you even have a pocketknife at the time?

A. No, I did not.

Q. Did you take a pocketknife down there with you?

A. No, I did not.

Q. Do you even own a whet rock?

A. No, I do not.

Q. At the time did you even own a pocketknife?

A. No, I did not.

Q. Let me ask you what you did from that point on, from

then on? Did you know at that time that Mr. Malone was dead?

A. I knew that he had been cut, but I didn't know he was dead. . . .

[594] [Testimony of Petitioner Beck on Cross-Examination]

Q. And you said you were holding him?

A. Yes, sir, I did.

Q. Describe to the jury how you were holding him, Mr. Beck?

A. Mr. Malone was down on the floor on his hands and knees and I was behind him holding him around his waist, kind of to the left side of him.

Q. Well, now, in your statement here you said that the first thing, "We stayed in the house and talked for a few minutes and Roy had gone to the bathroom. As he was coming back from the bathroom I grabbed Mr. Malone." That's the first thing that happened then, was when Roy was coming back from the bathroom you grabbed Mr. Malone?

[620] **A.** As he was coming back out of the bathroom into the kitchen where me and Mr. Malone was at the door. When he entered the kitchen coming back out of the bathroom where the closet was where the money was at he looked at me and nodded his head for me that he was ready to tie them up and Rob them.

Q. But at that time he hadn't made any move, had he, Mr.—Roy Clements hadn't made any move, had he, Mr. Beck?

A. I hadn't made no move neither until he nodded his head to tell me that he was ready.

Q. In other words, you moved at the nod of his head; is that right, sir?

A. I did.

Q. "I grabbed Mr. Malone and he went down on his knees and hollered for Aunt Mae to get the gun." Is that right, sir?

A. That is right.

Q. "And Roy then grabbed Aunt Mae and hit her——"

MR. BOLTON: You Honor, now, I'm going to object to that and the District Attorney knows——

THE COURT: I'm going to sustain the objection.

Q. Now, you know that Mr. Malone was cut in the—on the shoulder, don't you, sir? In the front part of his shoulder, don't you, sir?

A. No, I don't.

Q. You didn't know that, sir?

A. No, I don't.

[621] MR. BOLTON: Your Honor, I move to exclude that because there's no evidence in this trial by anybody that he was cut on the shoulder.

MR. RAYBURN: There was a stab wound, your Honor, the best I can recall.

MR. BOLTON: Wasn't on his shoulder, your Honor, and I move to exclude it.

THE COURT: Ladies and gentlemen, disregard that last question as to a cut on the shoulder. There has been no testimony in this case about a cut on the shoulder. So, disregard that completely from any consideration that you may have in your deliberations.

Q. You were holding him, now, Mr. Beck, around the—down on the floor; is that right?

A. That's correct.

Q. And he was hollering according to your statement here for——

THE COURT: Mr. Rayburn. I've already excluded that one time.

Q. And then while you were holding him, is it your testimony that Roy Clements came and cut him?

A. That's right. While I was holding I was also trying to reach for that rope and trying to tie him up.

Q. Now, then, Mr. Roy Malone was facing the floor when he was cut; is that right, sir?

A. He was on his hands and knees, sir?

[622] **Q.** And you were holding him around his waist; is that right, sir?

A. Best I could and trying to tie him up at the same time by myself.

Q. And you have been a carpenter by trade, haven't you?

A. Yes, I have.

Q. Been a number of things?

A. Yes, I have.

Q. Do you mean to tell this court and jury you didn't have a knife with you on this occasion as a former carpenter?

A. That's true.

Q. And you're saying that back before this all started that you had been talking on numerous occasions and planning this robbery, is that—of Roy Malone; is that correct, sir?

A. I had not been planning no robbery or planning nothing. Roy Clements and Mary Ann Thrasher was the one that always talked about planning a robbery.

Q. Well, back to your statement on page one, Mr. Beck, it said, "We had planned on pulling the robbery the first trip, but this car drove up and we decided to leave."

A. Well, I was always in the presence most of the time when it was being talked about and discussed. Yes, I'll admit that. That was intended. Yes, the robbing part was, but hurting or killing or harming anyone was not intended by no one.

[623] **Q.** And so, there was a conspiracy, then, on your part?

MR. BOLTON: Your Honor, now, I object to the framing of Mr. Rayburn's remarks.

MR. RAYBURN: I'll rephrase the question, Judge.

THE COURT: All right.

Q. There was an agreement, then, between you—your testimony, between you and Roy Clements and Mary Ann Thrasher to rob Mr. Malone; is that correct, sir?

A. An agreement. What kind of an agreement?

Q. Well, plan.

A. I mean, we was to rob him, get the money, split it 50/50, yes. . . .

[624] CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

[Closing Statement of Defense Counsel]

Is there a whole lot of difference between a pool of blood and a charred body? You've seen this man. You make the decision, but are you willing to trust the District Attorneys of the state of Alabama, any place else? To decide at the outset, not during the course of the trial, but to decide that I will pick this man or that man to tell the jury they've got to electrocute him, and I'll let this man go on the old common law murder, which will not be electrocution. I'm not telling you that this man should not be punished. We told you from the beginning that we believe that punishment, life imprisonment. And I'll tell you this, if I can have any opportunity under any reindictment or any other way to take him before this bar of justice and enter a plea of guilty of murder, robbery, either one, life in prison, I'll take him. I'll take him, but I ask you and I beg of you, don't be stampeded. . . . [689]

SUPREME COURT OF THE UNITED STATES

No. 78-6621

GILBERT FRANKLIN BECK, PETITIONER,

v.

ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Alabama.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to the question presented by the Court: May a sentence of death constitutionally be imposed after a jury verdict of guilty of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?

October 9, 1979

☆ U.S. Government Printing Office: 1979—305-520/132

Supreme Court, U. S.
FILED
JUN 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-6621

GILBERT FRANKLIN BECK, Petitioner,

v.

STATE OF ALABAMA, Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO.

GILBERT FRANKLIN BECK, Petitioner,

v.

STATE OF ALABAMA, Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Comes now the State of Alabama by and through the Attorney General of Alabama and respectfully asserts that the Petition for Writ of Certiorari is due to be dismissed and that this matter should not be reviewed by this Honorable Court.

STATEMENT OF THE CASE

This case arose from the Circuit Court of Etowah County, Alabama after the Petitioner was convicted therein for the offense of "robbery or attempts thereof, when the victim is intentionally killed by the Defendant" (Code of Alabama, 1975, §13-11-2(a)(2). The punishment was set at death.

The appeal of the conviction resulted in affirmance by the Court of Criminal Appeals of Alabama. Application for rehearing was denied on May 2, 1978. Petition for certiorari was filed by the Petitioner and granted. After oral argument the Alabama Supreme Court issued an opinion affirming the decision of the Court below. Execution was set to take place on March 30, 1979.

Application was made to the Alabama Supreme Court to stay the execution. The stay was granted on March 21, 1979, in order to give the Petitioner the opportunity to have this Honorable Court review Petitioner's conviction.

Thereafter, the Petitioner filed this petition to which this brief is in opposition.

REASONS FOR DENYING THE WRIT

The Petitioner has raised numerous issues in his petition which deal with the constitutionality of Alabama's capital punishment statute under which he was convicted.

Without a detailed discussion of those issues dealing with the merits of this case the Respondent offers the following argument as to why this cause should not be reviewed by this Honorable Court.

Initially, the Respondent would point out that the Alabama Appellate Courts have reviewed these matters raised in the petition, fully considered them and correctly decided the issues. In the present case before this Honorable Court, similar issues as are raised now were raised before the Alabama Court of Criminal Appeals. See Beck v. State, 365 So. 2d 985 (Ct. Cr. App. 1978). It is evident that the Alabama Courts below have fully considered and correctly decided these issues. In relation thereto, the Alabama Courts have addressed numerous appeals under Alabama's capital punishment statutes and have faced these issues on most of those cases. As examples of decisions by Alabama Courts which have previously discussed these issues raised by the Petitioner see in addition to Beck, supra, Jacobs v. State, 361 So. 2d 640 (1978); Evans and Ritter v. State, 361 So. 2d 654 (Ala. Ct. Cr. App. 1977), affirmed in part, reversed and remanded in part, 361 So. 2d 666 (Ala. 1978), aff. after remand; Evans v. State, 361 So. 2d 672.

Further, it should be pointed out that the decisions of the Alabama Courts mentioned above which construe Alabama's capital punishment statute are consistent with and are not in conflict with the relevant decisions of this Honorable Court.

By way of demonstration, it should be noted that Alabama's capital punishment statute which precludes any lesser included offense is not violative of the Petitioner's right to due process and equal protection. Further, this type statute helps to avoid that aspect of discrimination in death cases as is discussed in Furman v. Georgia, 408 U. S. 238. This is especially true when it is considered that Alabama's statute provides for judicial sentencing in capital cases. Thus providing for greater consistency and fairness in sentencing.

This leads to the second issue raised by the Petitioner which asserts that the jury should consider mitigating circumstances. Alabama's procedure which makes the trial judge the sentencing authority is in full compliance with Furman, supra. Further, an almost identical procedure of sentencing has been upheld by this Honorable Court in Proffitt v. Florida, 428 U. S. 242, 49 L. Ed 2d 913, 96 S. Ct. 2960 (1976).

Petitioner's issue three complains of the sentencing procedure under Alabama's statute. Again we would note that the sentencing procedure here avoids the precise concerns of lack of adequate safeguards on imposition of the death penalty as expressed in Woodson v. North Carolina, 428 U. S. 280, 49 L. Ed 2d 944, 96 S. Ct. 2978 (1976) and Roberts v. Louisiana, 428 U. S. 325, 49 L. Ed. 2d 974, 96 S. Ct. 3001 (1976). The procedure expresses a plan whereby a maximum amount of protection is afforded to a defendant. Also, this type sentencing procedure has in substance been upheld as constitutional in Proffitt, supra.

On the whole, it can be seen that the application of the case law to the case at bar and Alabama's capital punishment statute reveals that the Alabama Courts below have correctly and fully decided the issues raised by the Petitioner. These attacks on Alabama's statutes only reveal that the interpretation below did not deprive the Petitioner of his constitutional rights.

As pointed out above, the Respondent argues that the Alabama Courts have fully decided and correctly determined these matters now raised. The Respondent submits that the Petitioner's argument is without merit in that the prior decisions of this Honorable Court are controlling on these issues and these issues therefore must be resolved in the Respondent's favor.

Further, it is noted that many of the cases relied on by the Petitioner are distinguishable on the statutes which they construe. These cases do not fully support the issues raised and allegations made by the Petitioner.

For these reasons the Respondent submits that the Petition for Writ of Certiorari is due to be denied. There has been no showing by the Petitioner of any conflicts of decisions below. Further, there has been no showing in the brief of the extreme importance of this petition sufficient for this Court to review. No showing is made of a complete departure by the Court below from the accepted and usual course of judicial proceedings.

Absolutely no showing is made that the case is one which should be reviewed by this Honorable Court under Rule 19 of the Rules of the Supreme Court of the United States, adopted June 15, 1970, revised May 1, 1978. This being true, the Respondent submits that this matter should not be reviewed. Therefore, the Petition for Writ of Certiorari is due to be denied.

CONCLUSION

Based on the above showing that the holding by the Alabama Courts in this cause is not in conflict with the decisions of this Honorable Court it is respectfully urged that the Petition for Writ of Certiorari is due to be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

GILBERT FRANKLIN BECK,

Petitioner

STATE OF ALABAMA,

Respondent

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

AFFIDAVIT OF PROOF OF SERVICE

State of Alabama Montgomery County

I, the undersigned, Assistant Attorney General of Alabama, 64 North Union, Montgomery, Alabama 36130, hereby certify that I have deposited for service three (3) copies of a brief in opposition to the Writ of Certiorari to the Honorable David Klingsberg, 425 Park Avenue, New York, New York 10022, and ten copies to the Clerk of the Supreme Court of the United States.

This the 29th day of May, 1979.

Walter S. Turner

WALTER S. TURNER
Chief Assistant Attorney General
64 North Union
Montgomery, Alabama 36130

Sworn to and subscribed before me the undersigned, this the 29th day of May, 1979.

Cynthia F. Sherman

CYNTHIA F. SHERMAN
Notary Public

Supreme Court, U. S.
FILED
NOV 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 78-6621

GILBERT FRANKLIN BECK,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF OF PETITIONER

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (A. 53-54), reported at 365 So.2d 1006 (Ala. 1978), including dissents by two Justices, and the opinion of the Court of Criminal Appeals of Alabama (A. 17-52), reported at 365 So.2d 983 (Ala. Crim. App. 1978), are reproduced in the Joint Appendix previously filed with this Court.

JURISDICTION

The jurisdiction of this court is based on 28 U.S.C. §1257(3) (1970), the petitioner having asserted below and in this Court that his rights secured by the Constitution of the United States were violated by the procedures pursuant to which he was convicted of a capital offense and sentenced to death.

The judgment and opinion of the Supreme Court of Alabama was entered on December 8, 1978. On January 8, 1979, the Supreme Court of Alabama set March 30, 1979 as the date for petitioner's electrocution, and on March 21, 1979, stayed the execution until further order of that Court. This Court granted a writ of certiorari on October 9, 1979.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Alabama law: Section 13-11-1 through Section 13-11-9, Code of Alabama (1975); Section 13-1-73, Code of Alabama (1975); Section 15-17-1, Code of Alabama (1975).

These constitutional and statutory provisions are set forth in Appendix A to this brief.

QUESTION PRESENTED

By order of this Court dated October 9, 1979, the petition for a writ of certiorari was granted limited to the following question presented by the Court: "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?"

STATEMENT OF THE CASE

Petitioner Gilbert Franklin Beck was indicted by an Etowah County, Alabama, grand jury that charged he committed a robbery on November 8, 1976, during the course of which he intentionally killed Mr. Roy Malone, the victim of the robbery.[1] Petitioner was indicted pursuant to Section 13-11-2(a)(2) of the Alabama death penalty statute,[2] which specifies, among others, the following capital offense: "Robbery or attempts thereof when the victim is intentionally killed by the defendant."

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[1] The indictment is set forth at R.821 and is quoted in large part in the opinion below of the Alabama Court of Criminal Appeals. Beck v. State, 365 So.2d 985, 987 (Ala. Crim. App. 1978).

[2] Alabama's death penalty statute is set forth at Section 13-11-1 through Section 13-11-9, Code of Alabama (1975).

I.

THE EVIDENCE ON PETITIONER'S GUILT OR INNOCENCE

Petitioner denied in his trial testimony that he killed Malone (A. 58). Other than petitioner, who took the stand in his own defense, no eyewitnesses testified at the trial concerning the killing of Malone. Petitioner admitted that on November 8, 1976 he went with Roy Clements to Malone's house to carry out a robbery. R. 585-86.[3] Petitioner further testified that Clements killed Malone. Although Clements was the only other eyewitness to the killing, the State did not call him as a trial witness.[4]

According to petitioner, he and Roy Clements arrived at Malone's house at 2:30 P.M. that day. R.587.[5] At

[3] In his so-called "Voluntary Statement (Under Arrest)," dated November 9, 1976, and furnished in the early hours of the day following the commission of the alleged crime, petitioner also denied that he killed Malone, and admitted committing the robbery. A.22-24. At the sentencing hearing before the court, petitioner reiterated that he did not kill Malone and that he had no idea before the robbery that the victim might be killed. R.779.

[4] Clements was also tried, convicted and sentenced to death for his involvement in the robbery-killing. However, his conviction and sentence have been reversed on state-law grounds. Clements v. State, 370 So.2d 723 (Ala. 1979).

[5] Earlier that day, according to petitioner, he and Roy Clements went to Malone's house and engaged Malone in conversation in his yard about materials for building chicken pens. R.585. According to petitioner's "Voluntary Statement," petitioner admitted that the purpose of this trip was to rob Malone. R.1113-16. Shortly thereafter, three men arrived at Malone's house by car, at which time petitioner and Roy Clements left and returned to Beck's trailer home several miles away. R.586.

that time, petitioner and Roy Clements entered the house and found Malone in the kitchen. R.589.

Petitioner further testified that he contemplated that no physical harm would be inflicted on Malone. R.588. Indeed, according to the petitioner, he and his accomplice, Roy Clements, had agreed beforehand that they would only tie up Malone, an elderly retired veterinarian, in the course of the robbery. A. 56. Pursuant to their plan, petitioner, after conversing with Malone for a period of time, received a head-nod signal from Clements, following which petitioner seized Malone from behind and sought to tie him up with rope. A. 56-57. At this point, petitioner testified, Roy Clements came up to Malone and unexpectedly "whacked his neck on the right side of the neck." R.592. Petitioner immediately jumped up and protested Roy Clements' assault on Malone: "I jumped up and I said, 'Oh, my God, Roy . . . Why did you do that?' " R.592. Petitioner also testified that he did not have a knife in his possession and never assaulted Malone with any weapon. A. 58.

Following Clements' knife assault on Malone, petitioner testified that he left Malone's house without taking anything and got into his truck. A. 57-58. Clements emerged from Malone's house "two to three minutes" later with a lady's purse and a wallet in his hand. A. 58. During a lengthy cross-examination by the prosecuting attorney, petitioner maintained that he did not kill Malone, never contemplated that Malone might be killed or that a knife would be used during the robbery, and that he took nothing from Malone's house. R.608-39, 653-54.

Petitioner further testified that after he and Clements

left Malone's house they returned to Beck's trailer and awaited the return of Mary Ann Thrasher (the woman Beck was living with in the trailer) and Deborah Clements (Clements' wife and Thrasher's daughter). It was determined that the robbery netted some $73. Petitioner then burned his clothes, which had been spotted by Malone's blood. R.599. Later that afternoon, Clements, with petitioner, Deborah Clements and Thrasher in the car, drove to a mountain adjacent to a nearby highway, at which point the wallet and billfold were thrown away, R.601-02. Petitioner testified that, on the way back from the mountain, Roy Clements and Thrasher decided to return to Malone's house in order to steal the large sums of cash which Thrasher believed were still in the house. R.602.[6] Because police vehicles were already at the Malone house, Clements drove past without stopping. R.603. A few hours after the robbery, petitioner was arrested by local police authorities and has been incarcerated ever since.

The crucial fact-issue in the case was whether the State proved the vital element of the capital offense, *i.e.*, whether petitioner intentionally killed Malone.[7] The State's case against petitioner was based entirely on

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[6] According to petitioner, Thrasher had repeatedly proposed the robbery of Malone, a person she stated had secreted large sums of cash in his house. R.582-84.

[7] Under the Alabama death penalty statute, it was not sufficient merely to prove that petitioner participated in a robbery where the victim was killed. The latter would constitute, at most, felony murder, a non-capital offense in Alabama. Thus, §13-11-1(b) of the Alabama death penalty statute provides:

> "Evidence of intent under this section shall not be supplied by the felony-murder doctrine."

circumstantial evidence, much of which was inconsistent with other testimony, including both the State's and petitioner's witnesses.

The State's principal witness on the issue of whether Beck intended to kill the victim of the robbery was Thrasher. Thrasher testified that she had known petitioner for about two years and that prior to November 8, 1976 she had been living with him in his trailer home. R.383-84. Thrasher further testified that around noon on November 8, while petitioner was in his trailer, he was sharpening a pocket knife "on a whet rock." R.387-88.

Deborah Clements, however, who (with her husband) was also present in petitioner's trailer prior to the robbery of Malone, testified that she did not see petitioner sharpen any knife. R.490. Petitioner also denied that he had any type of knife or a "whet rock" in his possession that day. A. 58. Furthermore, according to the trial testimony of Elizabeth Lane (Beck's sister), Thrasher made statements outside the courtroom implicating herself as a conspirator in the scheme to rob Malone. Lane also testified that Thrasher had stated that she did not believe that petitioner killed Malone. R.543. Petitioner's brother, William T. Beck, testified that "Mary Ann [Thrasher] made the statement that she was going to tell some lies also. That if anything was–that putting it off on her, trying to say that she was the instigator, then she was going to do some lying." R.562. Moreover, Thomas Earl James, a first cousin of Thrasher, testified that her general reputation in the community for truth and veracity was bad. R.659.

The testimony of the State's expert medical witnesses was also contradictory and, therefore, provided no support to the State's contention that petitioner intentionally killed Malone. Thus, Bill Braff, the Coroner for Etowah County, testified that it was his opinion that the fatal knife wound was on the left side of Malone's neck. R.237. Van Pruett, Jr., a State Toxicologist, on the other hand, testified that Malone was wounded on the right side of the neck. R.230.[8] Furthermore, Pruett conceded that he could not determine whether the person who had inflicted this wound on the victim was standing in front of the victim or behind him. R.259.

II.

THE TRIAL COURT'S CHARGE TO THE JURY

The Alabama death penalty statute precludes a lesser-offense instruction in a capital case by providing that the 14 listed offenses which Alabama defines as capital "shall not include any lesser offenses."

[8]This confusion about the precise nature and location of the fatal wound may have been caused by the failure of the police to adequately preserve the security and integrity of the deceased body, which was removed to a funeral home before an autopsy was performed. *See* R.234.

§13-11-2(a).[9] In accordance with this statute, the trial judge's charge did not permit the jury to convict petitioner on any lesser-included offense such as first-degree murder (which includes the offense of felony murder under Alabama law) or robbery, all of which are non-capital offenses. *See* Point IV, *infra.* Instead, in accordance with the Alabama death penalty statute, the trial judge told the jury that it could return the following verdicts: acquittal, not guilty by reason of insanity or conviction of the capital crime of robbery and intentional killing. R.743, 746-47.

The trial judge also charged that "if [petitioner] is acquitted in this case he can never be tried for anything that he ever did to Roy Malone" (R.743), and that "if the jury finds the defendant not guilty the Defendant must be discharged." *Ibid.* By virtue of these instructions, the jury was foreclosed from finding petitioner guilty of any crime other than the capital crime of robbery-intentional killing. The jury was told that if they acquitted petitioner, he could never be convicted and punished for robbing Malone.

[9]It is firmly established that the Alabama stature precludes lesser-offense instructions in capital cases. Thus, §13-11-2(a) of the law provides in pertinent part: "If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses . . . *and which offenses so charged . . . shall not include any lesser offenses . . .*" (emphasis added). As stated by Chief Justice Torbert in his concurring and dissenting opinion in Jacobs v. State, 361 So.2d 640, 646 (Ala. 1979), *cert. denied*, 439 U.S. 1122 (1979), "the capital jury in Alabama cannot convict a defendant for a lesser-included offense." *See also* Evans v. Birton, 472 F. Supp. 707, 714 (S.D. Ala. 1979) ("Under the Alabama statute, the trial jury is specifically precluded from considering any lesser offenses that might be revealed by the evidence").

The trial judge's instruction did not provide the jury with clear guidance on the critical issue of whether petitioner had the requisite intent to kill. Indeed, the instruction indicated that defendant could be found guilty merely on the basis of his presence at the scene and his admission that he went with Clements to Malone's house with the intent to carry out a robbery. Thus, the trial judge gave the jury the following aider-and-abetter instruction:

> "If a person aids or abets another in the commission of a crime he is as guilty as the party who commits the crime and is thus aided and abetted by him. The words 'aid and abet' as I have used them in this charge comprehend all assistance rendered by act, words, encouragement, support or presence, actual or constructive to render assistance should it become necessary." R.734-35.[10]

The trial judge also failed to focus on the issue of intent-to-kill when he instructed the jury that defendant could be found guilty as a mere conspirator:

> "In general, a conspiracy comes into being when two or more persons enter upon a unlawful enterprise with a common purpose to aid, assist, advise or encourage each other in whatever may grow out of the enterprise upon which they enter. Each is responsible for everything which may consequently and proximately result from such unlawful purpose, whether specifically contemplated or not and whether actually perpeprated

[10]Petitioner's trial counsel excepted to this part of the trial judge's charge. A. 11-12.

> by all or less than all of the conspriators." R.736.[11]

Furthermore, the trial judge defined for the jury a "capital felony" as one "committed while the Defendant was engaged or was an accomplice in the commission of or attempt to commit or flight after committing or attempting to commit rape, robbery, burglary or kidnapping for ransom." R.744.

On the issue of sentence, the trial judge instructed the jury that its deliberations were to be governed by §13-11-2(a) of the Alabama death penalty statute, which the court paraphrased as follows: "If the jury finds the Defendant guilty they shall fix the punishment of death . . ." R.742. He reiterated that if the jury found petitioner guilty, its form of verdict should be "guilty . . . and we fix the punishment at death." R.746-47.[12]

III.

THE SENTENCING HEARING BEFORE THE COURT

Following the jury's guilty verdict and sentence of death, the jury was discharged and a hearing was scheduled, as required by §§13-11-3, 13-11-4, 13-11-6, 13-11-7 of the Alabama death penalty statute, for the

[11]The Alabama death penalty law does not include the crime of conspiracy (which in Alabama is a non-capital offense, Alabama Code §13-9-20 (1975)). Thus, petitioner's trial counsel took an exception to this instruction (R.748), that if the jury believed that petitioner was a mere conspirator, he could be found guilty of the capital crime, even though the killing was committed by someone else.

[12]§13-11-2(a) in pertinent part states: "If the jury finds the defendant guilty, it shall fix the punishment at death. . . ."

trial judge to consider "aggravating" and "mitigating" circumstances and to decide whether to accept the death sentence as fixed by the jury. R.758.

At the sentencing hearing before the trial judge, petitioner testified, as he had at trial, that he did not kill Malone, and that he had no idea beforehand that the victim of the robbery was in any danger of being killed. R.779. Petitioner also testified that he had never before in his life been charged with a criminal offense. R.775. Petitioner also stated that he served in the Marines and received an honorable discharge. R.775.

Following oral argument, the trial judge found aggravating circumstances pursuant to the Alabama death penalty statute, including the following which corresponds to §13-11-6(4) of Alabama's law: "That a capital felony was committed while the Defendant was engaged or was an accomplice in the commission of a robbery." This finding was mandated by the jury's finding that petitioner was guilty of robbery-intentional killing.[13]

[13]The trial judge also found, pursuant to §13-11-6(8), that "The capital felony was especially heinous, atrocious, or cruel," and, pursuant to §13-11-6(6), that "the capital felony was committed for pecuniary gain." R.813. The trial judge also stated at this point that "two or more human beings [were] intentionally killed by the defendant by one or a series of acts." R.813. This statement is inexplicable, since petitioner was tried only for the murder of Malone and no evidence was introduced implicating him in any other death. When the trial judge found the felony "especially heinous, atrocious, or cruel," he provided no reasons why petitioner's crime differed from other robbery-intentional killings, even though the statute's use of the word "especially" necessitates such an explanation. The fourth aggravating circumstance, set forth in §13-11-6(5), found by the trial judge was "[t]hat the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. . . ." R.812.

After listing the aggravating circumstances, the trial judge found a single mitigating circumstance under §13-11-7(1) of the law: "the Defendant has no significant history of prior criminal activities." R.813. The trial judge, however, gave no weight to testimony concerning petitioner's exemplary employment history (*see* R.566-76), to the fact that he had served honorably in the U.S. Marines (R.775), to the fact that petitioner's two requests to take a lie-detector test had been refused (R.781), or to testimony concerning petitioner's psychological difficulties (R.782, 798-800), or to petitioner's unrefuted testimony that he did not kill Malone, did not intend to do so, never anticipated that Malone would be killed, and immediately protested his accomplice's lethal assault when it occurred.[14] The trial judge made no written findings and simply confirmed the jury's death sentence.

Petitioner's unsuccessful appeals in Alabama's appellate courts followed and a writ of certiorari was granted by this Court on October 9, 1979.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner's contention that Alabama's procedures for trial and sentence in capital cases violate the United

[14]One of the "mitigating circumstances" under Alabama's law is the following: "The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor." §13-11-7(4). The trial judge did not even mention the possibility that this "circumstance" might be applicable.

States Constitution was raised before trial in a motion to quash the indictment which the trial judge denied. A. 55; R.39-45,105. In the course of oral argument on that motion, petitioner's trial counsel specifically objected to Alabama's preclusion of a lesser-offense instruction, noting that the Alabama law "says to the jury that you have got a choice of two things, either you can sentence him to die or you can acquit him." R.40. At the close of his argument, petitioner's counsel stated: "I would ask your Honor to seriously consider the aspects of where the jury can only find his guilt and sentence him to die . . . The jury can only find him guilty of a capital crime and sentence him to die or they can acquit him." R.44-45. Petitioner's trial counsel also took exceptions to the form of the verdict stated by the trial judge (R.748), and to the charge on the issues of conspiracy and aiding and abetting. R.748-49.

After his conviction and sentence of death, petitioner pressed his federal constitutional objections, including his objection to the preclusion of a lesser-offense verdict, before the Alabama Court of Criminal Appeals, which, in a lengthy opinion (A. 17-52), rejected them on the merits and specifically upheld the feature of Alabama's law pursuant to which the "trial jury cannot be instructed on lesser included offenses." A. 39, 40. In his petition to the Alabama Supreme Court, petitioner reiterated his federal constitutional contentions, which that Court rejected in a two-page opinion on the authority of a prior decision.

SUMMARY OF ARGUMENT

Since this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), over 30 states have enacted new

capital punishment statutes in an attempt to preserve the death penalty and, simultaneously, eliminate the defects of unbridled sentencing discretion stressed in the *Furman* opinions. Of those states, Alabama was the only one to institute a capital punishment procedure which precluded capital juries from rendering a verdict that the defendant was guilty of a lesser, non-capital crime. Alabama's law, moreover, is contrary to its own practice in non-capital cases and to the practice of every other state, the federal courts and Great Britain in non-capital and capital cases.

The essence of petitioner's argument is that by forcing capital juries to render all-or-nothing verdicts in cases (like petitioner's) where the evidence points to a defendant's guilt of a serious non-capital crime (here, felony murder or robbery),[15] Alabama's law subjects capital juries to unwarranted pressure to return a verdict of guilt on the capital charge. Thus, the law creates such a substantial risk of impermissibly influenced fact-finding that it violates the Due Process Clause and the Cruel and Unusual Punishment Clause and cannot be squared with numerous rulings of this Court. *E.g., In re Winship*, 397 U.S. 358 (1970); *Estelle v. Williams*, 425 U.S. 501 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976). In *Keeble v. United States*, 412 U.S. 205 (1973), the Court specifically recognized that this risk was of constitutional dimensions in a non-capital case. Given the irrevocable nature of the death penalty, the consequences of imposing that risk in a capital case are infinitely more troublesome.

[15]Point IV establishes that but for the Alabama statute, the evidence would have entitled petitioner to have the jury consider a lesser-offense verdict.

Moreover, the distortion of the fact-finding process affects the sentencing hearing as well as the guilt-finding process because a finding of guilt on the capital charge in petitioner's case *automatically* meant that there was an "aggravating circumstance" sufficient under Alabama law to support a death sentence. As this Court stated in *Gregg v. Georgia*, 428 U.S. 153, 199-200, n.50 (1976), criminal procedures which, among other things, preclude lesser-offense verdicts, "would be totally alien to our notions of criminal justice" and "would be unconstitutional." The singularity of Alabama's law and the threat it poses to the confidence and reliability of guilt and sentencing findings are sufficient to invalidate Alabama's law under the principles of this Court's decisions discussed in Point I, *infra* (relating to Due Process) and Point II, *infra* (relating to the Cruel and Unusual Punishment Clause).

Alabama's law also violates the Equal Protection Clause. *See* Point III, *infra*. The law singles out the precise category of defendants who are most in need of special safeguards for the deprivation of a well-established procedural protection. Since Alabama continues to provide the lesser-offense option in non-capital cases, its decision to eliminate lesser-offense verdicts in capital cases is not based on a considered view that the lesser-offense procedure is generally unsound. The only apparent basis for the discrimination in the Alabama statutes is an erroneous reading of this Court's *Furman* opinions. This is an insufficient basis for sustaining a classification with such potentially devastating consequences.

ARGUMENT

I.

BY NOT PERMITTING THE JURY TO CONSIDER A VERDICT OF A GUILT OF A LESSER-INCLUDED NON-CAPITAL OFFENSE, ALABAMA'S DEATH PENALTY STATUTE CREATED A SUBSTANTIAL RISK OF UNRELIABLE FACT-FINDING ON THE ISSUES OF GUILT AND SENTENCE AND THUS VIOLATED PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE.

Introduction

The fundamental defect of Alabama's death penalty statute is that it substantially increases the risk of fact-finding error in capital cases on the issues of guilt and sentence. There is no escaping the conclusion that where the jury is precluded from a finding of guilt on a lesser offense, its deliberations are likely to be impermissibly influenced by the prospect that a defendant, who is plainly guilty of a grave non-capital offense, will be totally freed by a not guilty verdict on the offense charged. In these circumstances, the jury is under pressure to render a guilty verdict even though the defendant may be guilty only of a lesser crime.

This case squarely presents the "difficult constitutional questions" under the Due Process Clause which this Court in *Keeble v. United States, supra*, 412 U.S. 205, 213 (1973), stated are raised by absolute statutory preclusion of a lesser-offense instruction. Because this is a capital case where a finding of guilt was sufficient by

itself to support a death sentence, these constitutional questions are even more serious than in *Keeble*, a non-capital case.

The jury found that petitioner was guilty of the capital crime of "robbery . . . when the victim is intentionally killed by the defendant." §13-11-2(a)(2). This finding necessarily infected the subsequent sentencing proceeding where the trial judge was required to find "aggravating" and "mitigating" circumstances in order to determine whether to impose the death sentence. One of the "aggravating circumstances" under Alabama's law is the following: "The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit . . . robbery." §13-11-6(4). The jury's finding of petitioner's guilt on the charge of robbery-intentional murder necessitated a finding of this aggravating circumstance, as the trial judge found. R.812-13[16] Since a finding of a single aggravating circumstance under Alabama's law is all that is required by the statute,

[16]The Alabama statute places the trial judge under intolerable pressure at sentencing in another way. The jury verdict against petitioner was mandatorily accompanied by a death sentence by the jury (without consideration of mitigating circumstances), as required by §13-11-2(a). This initial sentence by the jury was followed by a hearing on aggravating and mitigating circumstances after which the judge had to decide whether to "refuse to accept the death penalty as fixed by the jury." §13-11-4. This sentencing scheme places such obvious pressure on the judge, who must decide to override the jury's formal initial sentence, that it underscores the manner in which the jury's initial verdict infects the ultimate decision for life or death. Jacobs v. State, 361 So.2d 640, 649-50 (Ala. 1978) (Jones, J. dissenting), *cert. denied*, 439 U.S. 1122 (1979).

§13-11-4(1), the finding of guilt greatly enhanced the chances that petitioner would be sentenced to death.

It is well-established that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process." *Carey v. Piphus*, 435 U.S. 247, 259 (1978), quoting from *Matthews v. Eldridge*, 424 U.S. 319, 344 (1976). Where the stakes are life or death, there is a greater constitutional necessity for procedures which minimize the risk of error than in a non-capital case where defendant's liberty is at issue. *E.g., Powell v. Alabama*, 287 U.S. 45, 71 (1932); *Lockett v. Ohio*, 438 U.S. 586, 605 & n.13 (1978); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). In short, since Alabama's unique law deprives the jury of the opportunity to find a defendant guilty of the precise offense it may well believe that he committed under the facts, it is inconsistent with principles of fundamental procedural fairness.

The history of lesser-offense instructions and its virtually unanimous use support the conclusion that Alabama's law violates the Due Process Clause. Permitting convictions on offenses less than those charged is a practice that dates back beyond the eighteenth century, was widely utilized in the nineteenth century, and is today employed in the federal courts, Great Britain, Canada and every state in the Union. Even Alabama provided for lesser-offense instructions in capital and non-capital cases alike since at least the mid-nineteenth century. Only in 1975 did Alabama decide to preclude such instructions in capital cases, apparently on the basis of an erroneous interpretation of this Court's decision in *Furman*. This statutory innovation was not only a reversal of Alabama's long-standing practice of permitting lesser-offense verdicts in capital cases, but is

contrary to Alabama's continuing practice of permitting such verdicts in non-capital cases. Thus, Alabama's capital offense law, enacted in 1975, is inconsistent with the entire history and practice at common law which accords defendants this vital safeguard.

A. This Court's decision in *Keeble v. United States* and numerous supporting precedents compel the conclusion that Alabama's death penalty statute is contrary to the Due Process Clause.

In *Keeble v. United States, supra,* this Court confronted the question whether the Major Crimes Act of 1885, 18 U.S.C. §§1153, 3242, should be construed to prohibit a jury instruction on a lesser-included offense where the lesser offense was not one of the crimes enumerated in the Act. Petitioner in *Keeble* was convicted of assault to commit serious bodily injury on an Indian reservation, a federal crime under the Major Crimes Act. The trial court refused to instruct the jury on the lesser-included offense of simple assault. The Court, in an opinion by Mr. Justice Brennan for a six-Justice majority, held that the Major Crimes Act could not be construed to prohibit a verdict on a lesser offense even where the lesser offense was not an offense enumerated in the Act. 412 U.S. 212-214.[17]

[17]Mr. Justice Brennan's opinion was joined by Chief Justice Burger and Justices Douglas, White, Marshall and Blackmun. None of the three dissenters–Justics Stewart, Powell and Rehnquist–disputed the majority's analysis of the protection accorded by the option of a lesser-offense verdict to defendant's interest in reliable jury fact-finding. Rather, the dissent was predicated on the view that the lesser offense of simple assault was not a federal crime and, thus, to permit the jury to convict on such lesser charge would exceed the federal court's jurisdiction. 412 U.S. at 215-17 (Stewart, J., dissenting).

The Court's opinion in *Keeble* carefully explained the vital protection afforded by a lesser-offense instruction, stating that a basic function of the instruction was to avoid the substantial risk of convicting a defendant of a higher crime than actually was committed:

> "True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction–in this context or any other–precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory." 412 U.S. at 212

Then, the Court went on to describe the reason why deprivation of a lesser-offense instruction was so clearly detrimental to the defendant's interests in reliable jury fact-finding:

> "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction. In the case before us, for example, an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option has been presented. But the jury was presented with only two options: convicting the defendant of assault with intent to commit great bodily injury, or acquitting him outright. We cannot say that the availability of a third option–convicting the defendant of simple assault could not have resulted in a different verdict." 412 U.S. at 212-13.

By construing the Act to allow a lesser-offense verdict, the Court expressly recognized the difficult Due Process question that would otherwise be presented:

> "Indeed, while we have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser-included offense, it is nevertheless clear that a construction of the Major Crimes Act to preclude such an instruction would raise difficult constitutional questions. In view of our interpretation of the Act, those are questions that we need not face." 412 U.S. at 213 (footnote omitted).

Applied to petitioner's case, the Court's analysis in *Keeble* is compelling on the constitutional issue. As in *Keeble*, the evidence that petitioner was guilty of the serious offense of robbery was extremely strong. There was also evidence supporting a verdict of guilt on the non-capital crime of first-degree murder, which, under Alabama law, does not require that the defendant intended the victim's death. *See* Point IV, *infra*. But on the key issue of whether petitioner was also guilty of intentionally killing the victim, the issue was, in the words of *Keeble*, "very much in dispute." Petitioner not only denied that he killed the victim, he also testified that he had no idea that the victim might be killed and that he immediately protested the killing and left the scene when the accomplice unexpectedly carried out his deadly knife assault on the victim. In light of petitioner's admitted participation in a serious non-capital crime (robbery) which, even petitioner acknowledged, culminated in the deadly knifing of the victim, the trial jury was faced with an intolerable and unrealistic all-or-nothing choice on the issue of guilt.

The jury's dilemma was accentuated by the trial judge's instruction that in the event of acquittal, petitioner "can never be tried for anything that he ever did to Roy Malone [the decedent-victim]" and that if the jury found petitioner not guilty, he would be "discharged."

In sum, Alabama's law has the inescapable and impermissible effect of diverting the jury from focusing on the strong possibility that petitioner was guilty only of a non-capital crime (*e.g.*, first-degree robbery) and not guilty of the capital crime charged. Instead, the statute and the trial judge's charge focused the jury's attention on the appalling prospect that if it acquitted him of the crime charged, petitioner would be totally freed, even though he was plainly guilty of an extremely serious crime.

It is no answer to this argument that Alabama's capital juries will consider the grave consequences of a capital-crime conviction in reaching a verdict under Alabama's law.[18] This does not reduce to acceptable proportions the "substantial risk" noted in *Keeble* that a jury will opt for conviction where the only alternative is acquittal and where the jury may well have convicted him only of a lesser offense had that option been available. As stated by Justice Shores of Alabama's Supreme Court in her dissent from a recent decision upholding the constitutionality of Alabama's law:

> "[M]ost, if not all, jurors at this point in our history perhaps equally abhor setting free defendant where the evidence establishes his guilt of a serious crime. We have no way of knowing what influence either of these factors have on a jury's deliberation, and which of these unappealing alternatives a

[18] *See* Evans v. Birton, *supra*, 472 F. Supp. at 714-15.

jury opts for in a particular case is a matter of purest conjecture. We cannot know that one outweighs the other. Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them. The increasing crime rate in this country is a source of concern to all Americans. To expect a jury to ignore this reality and to find a defendant innocent and thereby set him free when the evidence establishes beyond doubt that he is guilty of some violent crime requires of our juries clinical detachment from the reality of human experience; and, in my judgment, renders the statute under which this defendant was convicted unconstitutional." *Jacobs v. State*, 361 So.2d 640, 651-52 (Ala. 1978) (Shores, J. dissenting), *cert. denied*, 439 U.S. 1122 (1979).

The operation of Alabama's law produced just the result feared by Justice Shores. According to the Alabama Attorney General's Office, of the first 50 defendants who pleaded not guilty and were tried under the law, 48 were convicted; of the first 45 sentenced after trial, 37 received death sentences.[19] This astonishing record of prosecutorial success—a 96% conviction rate in contested cases and an 82% death sentence rate—is sharply at variance with this nation's historical experience. *See Woodson v. North Carolina, supra*, 428 U.S. at 295, n.31 ("Data compiled on discretionary jury sentencing of persons convicted of capital murder reveal that the penalty of death is generally imposed in less than 20% of the cases").

Even before *Keeble*, this Court recognized the fundamental importance of the lesser-offense option in

[19]Respondent's Brief in Opposition to a Petition for a Writ of Certiorari, Jacobs v. Alabama (U.S. October Term, 1978, No. 78-5696), at 10, 35.

capital cases. *E.g., Stevenson v. United States*, 162 U.S. 313, 323 (1896) (reversing a conviction for murder and sentence of death on the ground that the trial judge's erroneous refusal to give an instruction on the lesser offense of manslaughter curtailed the power of the jury to "determine from all the evidence . . . whether the crime was murder or manslaughter");[20] *Hopt v. Utah*, 110 U.S. 574, 582-83 (1884) (reversing territorial court conviction for first-degree murder and sentence of death on the ground that certain comments in the trial judge's instructions were likely to influence the jury to make a finding of first-degree murder and to ignore an instruction on the lesser offense of second-degree murder). *See also Wallace v. United States*, 162 U.S. 466, 475 (1896) ("Necessarily it must frequently happen that particular circumstances qualify the character of the offense [charged], and it is thoroughly settled that it is for the jury to determine what effect shall be given to circumstances having that tendency whenever made to

[20]This Court cited *Stevenson* with approval in *Keeble*, 412 U.S. at 208.

[21]*Wallace*, which reversed a murder conviction and sentence of death, did not directly involve the lesser-offense instruction question, but instead, the question of whether the defendant should have been permitted to introduce evidence tending to show that he was guilty, at most, of the lesser charge of manslaughter. Citing *Stevenson*, the Court held that the exclusion of such evidence was fundamental error. 162 U.S. at 475-76. Thus, *Wallace*, *Hopt* and *Stevenson* stand for the proposition that trial courts must not only give lesser-offense instructions where supported by the evidence, but may not vitiate the effectiveness of such instructions by evidentiary rulings or comments suggesting that the jury should ignore the lesser-offense option.

appear in the evidence").[21] These cases are compelling support for a holding that Alabama's law imposes such undue constraints on the jury's ability to make an accurate and impartial finding on the issue of guilt that it is inconsistent with the Due Process Clause.[22]

[22]These cases also support a holding that Alabama's law deprived petitioner of his Sixth Amendment right to a trial "by an impartial jury," a safeguard applicable in state proceedings pursuant to the Due Process Clause of the Fourteenth Amendment. *E.g.*, Witherspoon v. Illinois, 391 U.S. 510, 518 (1968). It is well-established that the need for impartiality must be safeguarded from influences which may tend to undercut the jury's ability to "render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723 (1961). *Accord*, Turner v. Louisiana, 379 U.S. 466, 471-74 (1965). Alabama's law creates a substantial risk of undermining the jury's impartiality by injecting into its deliberations the consideration that even if the defendant is plainly guilty of a serious intermediate offense, he must be freed if acquitted of the capital offense. This choice is plainly at odds with the jury's customary ability to exercise "common-sense judgment." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). *Accord*, Frank v. Mangum, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting) ("Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere"), cited with approval in *Turner, supra*, 379 U.S. at 472. Because Alabama's law creates a grave risk that the jury's verdict on a capital charge will not be impartially based on solely the evidence, but instead will be pressured by the consequences of acquittal where the defendant is plainly guilty only of an intermediate offense, it also violates the Sixth Amendment.

B. Alabama's preclusion of lesser-offense verdicts subverts a capital defendant's presumption of innocence by creating an unacceptable risk of injecting impermissible factors into the jury's considerations.

The all-or-nothing choice of verdicts which Alabama's law gives capital juries necessarily subverts a capital defendant's presumption of innocence and the requirement that he be found guilty beyond a reasonable doubt, all of which are of constitutional dimension.

Thus, in *In re Winship*, 397 U.S. 358 (1970), the Court held that the beyond-reasonable-doubt standard itself was constitutionally required to "provide concrete substance for the presumption of innocence," to minimize "doubt whether innocent men are being condemned," and in order to establish "confidence" that a jury's finding of guilt has been made with "utmost certainty." *Id.* at 363, 364. As the Court emphasized, "the function of legal process is to minimize the risk of erroneous decisions." *Addington v. Texas*, 99 S.Ct. 1804, 1809 (1979).[23] *See also Speiser v. Randall*, 357 U.S. 513, 525-26 (1958).

The considerations set forth in *Winship* and *Addington* underscore the need for lesser-offense instructions in capital cases, particularly where, as here, there is strong evidence that the defendant is guilty only of a serious intermediate crime. As *Keeble* expressly recognized, there is a "substantial risk" that foreclosure of a

[23]In *Addington*, the Court held that the Due Process Clause required that the states adopt a standard of proof in civil commitment cases no weaker than "clear and convincing" evidence. 99 S.Ct. at 1813.

lesser-offense instruction may induce fact-finding error on the part of even the most conscientious juror. *Keeble* also recognized that this danger is especially acute where the nature of defendant's "intent" is the key issue in dispute, as is the case here. In this setting, to confront the jury with a choice of extremes—acquittal or conviction of a capital crime—is an invitation for even the most conscientious juries to render uncertain, emotion-laden verdicts lacking in confidence and pregnant with doubt.

Since the *Winship* ruling, this Court has made it clear that in order to ensure fair and accurate fact-finding by juries, more than a beyond-a-reasonable-doubt instruction is often necessary to comply with the Due Process principles underlying the *Winship* ruling. Thus, in *Estelle v. Williams*, 425 U.S. 501, 503 (1976), the Court stated that the Due Process Clause requires courts to "be alert to factors that may undermine the fairness of the fact-finding process" and "must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." On the basis of "reason, principle, and common human experience," as well as the *Winship* ruling, *Estelle* held that requiring a criminal defendant over his objection to appear before the jury in prison garb was so likely to "affect a juror's judgment" that "an unacceptable risk is presented of impermissible factors coming into play." 425 U.S. at 504-05.

Similarly, this Court recently held that whether a person is guilty of the crime charged must be "determined *solely* on the basis of evidence introduced at

trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) (emphasis added), *citing Estelle v. Williams, supra.* Where there is a "genuine danger that the jury would convict petitioner on the basis of . . . extraneous considerations," failure to provide safeguards to minimize that danger violates the Due Process Clause. *Taylor v. Kentucky, supra,* 436 U.S. at 488. *Accord, Cool v. United States,* 409 U.S. 100 (1972) (per curiam) (due process violated by instruction that accomplice's testimony in favor of defendant should not even be "considered" unless the jury first believed it beyond a reasonable doubt); *Mullaney v. Wilbur,* 421 U.S. 684 (1975).

Alabama's statutory preclusion of lesser-offense verdicts in capital cases poses a threat to the fairness of the fact-finding process at least as serious as the practices at issue in *Estelle* and *Taylor.* Where the defendant is plainly guilty of a serious non-capital offense but no such finding is allowed, the prospect of acquittal is such an omnipresent cloud over the jury's deliberations that even the most conscientious jury is likely to find that conviction on the capital charge is the only reasonable alternative. In such a situation, with the jury's attention diverted to the possibility of freedom for a defendant clearly guilty of a serious crime, there is a "genuine danger" of conviction on the basis of "extraneous considerations" rather than on the "evidence." At the very least, by pressuring the jury to choose among extremes, Alabama's law erects an "artificial barrier" to fair fact-finding in capital cases. *Cool*

v. United States, supra, 409 U.S. at 104.[24]

The lower federal courts have recognized that preclusion of a lesser-offense instruction, where otherwise appropriate, jeopardizes defendant's fundamental rights to fair jury fact-finding. *E.g., Joe v. United States,* 510 F.2d 1038, 1042 (10th Cir. 1975) (holding *Keeble* should be applied in a §2255 collateral proceeding to require a new trial because deprivation of a lesser-offense instruction "affected a right which *Keeble* recognized as fundamental against the background of

[24]This Court's decision in Jackson v. Denno, 378 U.S. 368 (1964) provides additional support for a holding that Alabama's law is invalid. In that case, the Court held that requiring the jury at the same time it considered the question of guilt or innocence to determine whether a defendant's confession was voluntary as a prerequisite for giving evidentiary weight to the confession violated the Due Process Clause. The Court stressed that "the evidence given the jury *inevitably injects irrelevant and impermissible considerations* of truthfulness of the confession into the assessment of voluntariness," 378 U.S. at 386 (emphasis added), and noted that since "a trustworthy confession must also be voluntary if it is to be used at all, generates natural and potent pressure to find it voluntary. Otherwise the guilty defendant goes free." *Id.* at 382. Similarly, Alabama's law, which in effect requires the jury to ignore the probability that defendant is guilty only of a serious non-capital crime, injects the "irrelevant and impermissible considerations" of freeing such a defendant into the central question of whether the evidence demonstrates that he is guilty beyond a reasonable doubt of the capital crime charged. In such cirumstances, the " 'practical and human limitations of the jury system,' *Bruton v. United States*, [391 U.S. 123, 135 (1968)], override the theoretically sound premise that a jury will follow the trial court's instructions." Parker v. Randolph, 99 S.Ct. 2132, 2140 (1979).

the Due Process Clause").[25] The same is true of state courts' decisions which recognize that the lesser-offense option is a fundamental constitutional right.[26]

[25]*See also* United States v. Comer, 421 F.2d 1149, 1153-54 (D.C. Cir. 1970) (reversing conviction for failure to give lesser-offense instruction on the ground that such an instruction would ensure that the jury would not return a verdict "in disregard of all the proof"); United States v. Tsanas, 572 F.2d 340, 346 (2d Cir.), *cert. denied*, 435 U.S. 995 (1978) ("the court should give the form of [lesser-offense] instruction which the defendant reasonably elects. It is his liberty that is at stake, and the worst that can happen to the Government under less rigorous instruction is his readier conviction for a lesser rather than a greater crime"); United States ex rel. Powell v. Pennsylvania, 294 F. Supp. 849, 852 (E.D. Pa. 1968), *appeal dismissed*, 425 F.2d 267 (3d Cir. 1970) (failure to give lesser-offense instruction, where otherwise appropriate, constitutes fundamental error requiring federal habeas corpus relief). *Accord*, United States ex rel. Matthews v. Johnson, 503 F.2d 339, 346 (3d Cir. 1974), *cert. denied sub nom.* Cuyler v. Matthews, 420 U.S. 952 (1975) ("We believe that the safeguards of due process will be satisfied only when all defendants in Pennsylvania murder trials are given the same opportunity, upon request duly made, to have a jury return a verdict of voluntary mansalughter as well as first and second degree murder").

[26]*E.g.*, People v. Modesto, 59 Cal.2d 722, 31 Cal. Rptr. 225, 382 P.2d 33, 38 (1963), *overruled on other grounds*, People v. Sedeno, 10 Cal.3d 703, 112 Cal. Rptr. 1, 518 P.2d 913 (1974) (Traynor, J.) (denial of lesser-offense instruction where such instruction is supported by "any evidence" violated defendant's "fundamental" and "constitutional" rights); *see also* Commonwealth v. Garcia, 378 A.2d 1199, 1203 (Pa. 1977) ("Allowing the jury to decide the case without adequate instruction as to the permissible [lesser offense] verdict . . . denies the jury information essential to a fair determination of the case," undercuts the *Winship* ruling, and is required "in order to avoid the possibility that the jury will erroneously convict the defendant of [a greater offense] when only [a lesser offense] has been proven").

Recently, a lower court has held that the constitutional principles underlying *Winship* are violated by refusal of a jury instruction on defenses that are supported by some evidence and by law. *Zemina v. Solem*, 438 F. Supp. 455, 469-70 (D.S.D. 1977), *aff'd per curiam*, 573 F.2d 1027 (8th Cir. 1978). Since a lesser-offense instruction provides much the same function, its availability may "raise a reasonable doubt in the jurors' minds" on the offense charged. *Ibid.* The reasoning in *Zemina* strongly militates against the validity of Alabama's law.[27]

The fact that a defendant's life is at stake means that there is an even greater necessity than ~~in capital cases~~ in non-capital cases (such as *Keeble*) for avoiding the substantial risks of erroneous conviction by requiring such a jury charge. This Court has consistently ruled that the necessity for a particular procedural safeguard varies with the nature of the deprivation faced by the defendant. *E.g., Speiser v. Randall, supra*, 357 U.S. at 520-21 ("the more important the rights at stake the more important must be the procedural safeguards

[27]The Alabama rule is also in effect an irrebuttable presumption against a finding of guilt on a lesser-included offense. This Court has frequently invalidated irrebuttable factual presumptions in cases involving fundamental rights. *E.g.*, Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1973); Leary v. United States, 395 U.S. 6 (1969); Carrington v. Rash, 380 U.S. 89 (1965). Such presumptions of fact must be based on at least a "rational connection" to proven facts which give rise to the presumption. Leary v. United States, *supra*, 395 U.S. at 36. There is absolutely no factual basis for conclusively presuming, as Alabama capital juries must, that capital defendants may not be guilty only of a lesser offense.

surrounding those rights"); *In re Winship, supra*, 397 U.S. at 370 (Harlan, J. concurring) (the decision as to whether the Due Process Clause requires a particular safeguard must "reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations"); *Mullaney v. Wilbur, supra*, 421 U.S. at 698-701.

Particularly where a defendant's life, as opposed to simply his liberty, is in the balance, this Court has consistently held that procedural safeguards which might not be constitutionally required in non-capital cases are necessary. *E.g., Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (because of the qualitative difference between capital and non-capital cases, there "is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.").

This rule has been held to apply as strongly to the process for determining guilt in capital cases as it does to sentencing. As the Court held in *Powell v. Alabama*, 287 U.S. 45, 71 (1932):

> "[t]he necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this

> would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and he is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

Accord, Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring) ("I do not concede that whatever [trial] process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case"); *id.* at 45-46 (Frankfurter, J., concurring).

In sum, the Due Process Clause does not necessarily require a uniform rule relating to lesser-offense instructions for capital and non-capital cases. The Court need only decide that because of capital defendants' overwhelming interest in reliable fact-finding, because of the life-or-death choice at stake, and because of the grave public interest in avoiding an erroneous and irrevocable capital conviction and execution, Alabama's law should be invalidated.

C. The Alabama statute's singular departure from long-established procedural practice in the United States and England offends the principle of fundamental fairness embodied in the Due Process Clause.

In determining whether the presence or absence of a particular procedural rule offends the Due Process

Clause, this Court has traditionally relied on several sources in order to determine whether the Constitution's "fundamental fairness" standard has been met. Thus, this Court has relied heavily on "history" in order to determine whether a given procedure is "fundamental to our system of justice." *Duncan v. Louisiana,* 391 U.S. 145, 153 (1968). *See also Mullaney v. Wilbur, supra,* 421 U.S. at 692-96; *In re Winship, supra,* 397 U.S. at 361. It has also relied on the extent of "adherence" to the practice in "common-law jurisdictions," *ibid.,* including the practice of the states and the federal courts (*e.g., Sandstrom v. Montana,* 99 S.Ct. 2450, 2454 & n.3 (1979)), and common-law jurisdictions outside the United States such as England. *See, e.g., Malinski v. New York,* 324 U.S. 401, 417 (1945) (Frankfurter, J.) (the Due Process Clause requires this Court to follow "those canons of decency and fairness which express the notions of justice of English-speaking peoples"). Under these standards, there are compelling grounds to conclude that allowing a lesser-offense conviction, given its history and widespread use, reflects "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana, supra,* 391 U.S. at 155. At least in a capital case, this Court should hold that absolute preclusion of that option violates the Due Process Clause.

The practice of every state in the Union (including Alabama), the federal courts, Great Britain and Canada has been to make the lesser-offense option available to juries. At present, the lesser-offense option is available in federal criminal trials pursuant to Rule 31(c), Fed. R. Crim. Proc. Every state provides criminal defendants

with an opportunity to seek a lesser-offense instruction in felony cases.[28] Other than Alabama, none of the more than 30 states which reenacted death penalty statutes after *Furman* took the step of precluding lesser-offense verdicts in capital cases;[29] capital juries in each of those states except Alabama are not precluded from considering lesser-offense verdicts.

The lesser-included-offense doctrine has long been an integral part of the criminal justice systems of both the United States and England. As early as 1554, it was established that English juries were permitted in capital cases involving a charge of murder to return a verdict of manslaughter. *Salisbury's Case*, 1 Plow. 101 (1554); *accord, MacKalley's Case*, 9 Co. Rep. 65 67b (1611).[30] By the early nineteenth century, the option of convicting a defendant on a lesser-included offense was well

[28]The state statutes and applicable cases interpreting those statutes are set forth in Appendix B to this brief.

[29]The states other than Alabama which have death penalty statutes are listed, along with citations to their capital punishment statutes, in Appendix C to this brief.

[30]Moreover, according to Blackstone, even in Gothic and Roman law there were recognized degrees of guilt by which the seriousness of offenses and their punishment was determined. 2*Blackstone's Commentaries*, p. 1587 (Lewis ed. 1898). And, according to Halsbury, at common law, juries were permitted to "convict of a cognate offense of the same character but of a less aggravated nature if the words of the indictment are wide enough to cover such an offence." 9 *Halsury's Laws of England*, p. 175 (2d ed.).

established in non-capital cases.[31]

[31]*E.g.*, Rex v. Withal and Overend, 1 Leach 88 (1772) (sustaining a conviction for the lesser offense of stealing where the defendant was charged with the offense of stealing *and* breaking and entering); Rex v. Hunt, 2 Camp. 583 (1811) (sustaining a conviction for the lesser offense of publishing a libel where the defendant was charged with composing, printing, and publishing a libel); M. Hale, *Historia Placitorum Coronae*, 302 (1778) ("the jury may find . . . the defendant guilty of part, and not guilty of the rest . . ."); J. J. Chitty, *Criminal Law* 250 (London ed. 1841) ("the jury may frequently find the prisoner guilty only of a minor offense included in the charge, or a part of the offenses there stated"); T. Starkie, *Treatise on Criminal Pleading*, 379-80 (1824 ed.) ("So in general where, from the evidence, it appears that the defendant has not been guilty to the extent of the charge specified in the indictment or the information, he may be found guilty as far as the evidence warrants, and be acquitted as to the residue. . . . The same principle applies where the description of the offence laid in any count of an indictment, includes that of a more general and less aggravated offence; then . . . the defendant may be found guilty of the more general and be acquitted of the more aggravated offence"). *See also* M. Hale, *Pleas of the Crown*, 267 (1716); 2 Hawkins, *Pleas of the Crown*, 623 (1788).

For American cases discussing the early English practice, *see* Commonwealth v. Jones, 319 A.2d 142, 144-45 (Pa. 1974); *cert. denied*, 419 U.S. 1000 (1974); Brown v. State, 206 So.2d 377, 380 (Fla. 1968).

Modern British practice retains the lesser-offense option as a matter of statutory law.[32] In cases involving an indictment for murder, including felony murder, §6(2) of the United Kingdom's Criminal Law Act of 1967 provides for convictions on lesser offenses such as manslaughter or another lesser felony.[33]

Similarly, in Canada the lesser-offense alternative is provided by statute. Thus, Section 589 of the Criminal Code of Canada not only provides for jury considera-

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[32]Thus, in cases involving neither murder nor treason, section 6(3) of the Criminal Law Act of 1967 provides:

"Where, on a person's trial on indictment for any offence except treason or murder the jury find him not guilty of the offence specifically charged on the indictment but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of any offence of which he could not be found guilty on an indictment specifically charging that other offence."

[33]§6(2) of the Criminal Law Act of 1967 provides:

"On an indictment for murder a person found not guilty of murder may be found guilty–

(a) Of manslaughter, or of causing grievious bodily harm with intent to do so; or

(b) of any offence of which he may be found guilty under an enactment specifically so providing, or under section 4(2) of this Act; or

(c) of an attempt to commit murder, or of an attempt to commit any other offence of which he might be found guilty;

but may not be found guilty of any offence not included above."

tion of lesser offenses in non-capital cases,[34] but "for greater certainty" it has a special statutory provision providing for lesser-offense verdicts in capital cases.[35]

D. The historical background of lesser-included-offense instructions in the United States.

The option of lesser-offense verdicts in the United States dates back to the eighteenth century. Thus, as early as 1794, Pennsylvania passed a statute requiring juries in murder cases to "ascertain in their verdict, whether it be murder of the first or second degree." Pa. Laws 1794, c. 2766, Section II. Only if the jury found the defendant guilty of murder in the first degree would the death penalty be imposed. *Id.*, Section I. As

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[34]Section 589(1) of the Criminal Code of Canada provides:

"A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

(a) of an offence so included that is proved, nothwithstanding that the whole offence that is charged is not proved, or

(b) of an attempt to commit an offence so included."

[35]Thus, Section 589(2) of the Criminal Code of Canada provides:

"For greater certainty and without limiting the generality of subsection (1), where a count charges capital murder and the evidence does not prove capital murder, but proves non-capital murder, the jury may find the accused nonguilty of capital murder or an attempt to commit non-capital murder, as the case may be."

the Court stated in *McGautha v. California*, 402 U.S. 183, 198 (1971), the purpose of allowing the jury the option of finding defendants guilty of second-degree murder was to "reduce the rigors" of "the common-law rule imposing a mandatory death sentence on all convicted murderers." In *Woodson*, the Court noted that following Pennsylvania's enactment, "[o]ther jurisdictions, including Virginia and Ohio, soon enacted similar measures, and within a generation the practice spread to most of the States." *Woodson v. North Carolina, supra*, 428 U.S. at 290.[36]

By the latter part of the nineteenth century, the lesser-included-offense doctrine was well established in the United States in capital and non-capital cases. As stated by one noted commentator of the time: "Where offenses are included within one another . . . a party indicted for any one of them may be convicted of any lower one." 1 Bishop, *Commentaries on the Criminal Law*, §795 at 469 (5th ed. 1872). *Accord, State v. Coy*, 2 Aikens (Vt.) 181, 182 (Sup. Ct. 1827); *Johnson v. State*, 14 Ga. 55, 59 (Sup. Ct. 1853); *Hardy v. Commonwealth*, 58 Va. 592, 598 (Ct. App. 1867).[37]

[36]In *Keeble*, this Court also noted that the "lesser included offense developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged." 412 U.S. at 208.

[37]*See* W. Clark, *Handbook of Criminal Procedure*, 403 (1918) ("If the whole of the offense charged is not proved, but so much of it as to constitute a substantive offense is proved, the defendant may be acquitted of the offense charged, and convicted of the offense proved, provided, at common law, each offense is either a felony or a misdemeanor. In most of our states, either by statute or independently of any statute, on indictment for felony, there may be a conviction of a misdemeanor included therein.").

Alabama's own experience beginning in the mid-nineteenth century appears typical. Thus, since 1852 the Code of Alabama has provided:

> "When an indictment charges an offense of which there are different degrees, the jury may find the defendant not guilty . . . of any offense which is necessarily included in that with which he is charged, whether it be a felony or a misdemeanor."[38]

Under this statute, the Alabama Supreme Court has held that a "defendant who is accused of the greater offense is entitled to have the court charge on the lesser offenses included in the indictment, if there is any reasonable theory from the evidence which would support the position." *Fulghum v. State*, 277 So.2d 886, 890, 291 Ala. 71 (1973). Even where the evidence supporting the lesser offense is "weak, insufficient, or

[38]Code of Alabama (1852) §647; Code of Alabama (1867) §4199; Code of Alabama (1876) §4904; Code of Alabama (1886) §4482; Code of Alabama (1896) §5306; Code of Alabama (1907) §7315; Code of Alabama (1923) §8697; Code of Alabama (1940) T.15 §323; Code of Alabama (1975) §15-17-1. There was a predecessor lesser-offense statute enacted by Alabama in 1841 which provided: "Upon an indictment for any offence consisting of different degrees, as prescribed by law, the jury may find the accused not guilty of the offence in the degree charged in the indictment, and may find him guilty of any degree of such offence inferior to that charged on the indictment, or of an attempt to commit such an offence; and whenever a person is indicted for an offence embracing one or more offences of a lesser character, if the guilt of the accused is not made out as charged, it shall be competent for the jury, if the proof authorizes it, to find the accused guilty of the lesser offence, whether a felony or a misdemeanor." Alabama Penal Code of 1841, §12, Clay's Digest 439-40.

doubtful in credibility," Alabama case law interpreting this statute requires an instruction on that offense to be given. *Davis v. State*, 19 So.2d 356, 358 (Ct. App. Ala. 1944). *Accord, Weldon v. State*, 50 Ala. App. 477, 280 So.2d 183, 184 (Ct. App. Ala. 1973). ("No matter how slight the evidence may be supporting the defense offered by the appellant [defendant], he is entitled to have a correct statement of law given to the jury by the court and the determination of its weight is for the jury".)

In cases where the charge was murder, Alabama, as far back as the mid-nineteenth century, has mandated that the jury consider whether the defendant was guilty of first-degree murder (punishable by death until this Court's decision in *Furman*) or second-degree murder (a non-capital offense). Thus, the Alabama Code has required that juries must consider whether a defendant charged with murder is guilty of first-degree murder or of the lesser offense of second-degree murder.[39]

Moreover, it was well-settled that a principal purpose of this law was to protect the defendant's rights to have the jury make appropriate fact-findings based on the evidence. Thus, in a first-degree murder case where the

[39]This statute provided: "When the jury finds the defendant guilty under an indictment for murder, they must ascertain by their verdict whether it is murder in the first or second degree; but if the defendant on arrangement confesses his guilt, the court must proceed to determine the degree of the crime, by the verdict of a jury, upon an examination of the testimony and pass sentence accordingly." Code (1852) §115; Code (1867) §3657; Code (1876) §4299; Code (1886) §3728; Code (1896) §4857; Code (1907) §7087; Code (1923) §4457; Code (1940) Tit. 14, §317; Code (1975) §13-1-73.

trial court refused to instruct the jury on second-degree murder, the Alabama Supreme Court held that it was "the mandatory duty of the court to instruct the jury orally as to the different and distinguishing elements of each degree of murder and further that it is error for the court to so instruct the jury as to take from it the right and duty to ascertain by its verdict whether the defendant was guilty of murder in the first or second degree." *Houlton v. State*, 254 Ala. 1, 48 So.2d 7, 8 (1950). And in *Jackson v. State*, 226 Ala. 72, 79, 145 So. 656 (1933), the Alabama Supreme Court held that the "refusal of the court to so instruct . . . is a charge on the effect of the evidence, and an invasion of the province of the jury."

In sum, the history of lesser-offense instructions in Alabama reveals that from at least the mid-nineteenth century until the enactment of the death penalty statute in 1975, all criminal defendants in Alabama had an opportunity to qualify for a lesser-included-offense instruction. Moreover, defendants charged with the crime of first-degree murder (a capital offense until *Furman*, and since 1975, an offense punishable by life imprisonment)[40] always received a lesser-offense instruction on the non-capital crime of second-degree murder. In such cases, it "was a duty from which the judge was without discretion to abstain." *Brown v. State*, 109 Ala. 70, 77, 20 So. 103 (1895). Since 1975, all non-capital defendants—even those charged with first-degree murder—continued to have the same rights to a lesser-included offense. Thus, Alabama's decision to preclude lesser-offense verdicts in capital cases marks a radical

[40]§13-1-74, Code of Alabama (1975).

departure, not only from contemporary standards in Alabama, but also from Alabama's traditional approach to the trial of capital cases going back to the mid-nineteenth century.

E. Lesser-offense instruction in the federal courts.

Since 1872, the lesser-offense procedure has been specifically authorized, first by federal statute and, since 1946, by Rule 31(c) Federal Rules of Criminal Procedure. The original lesser-offense statute was Section 9 of the Act of June 1, 1872, "An Act to further the Administration of Justice."[41] *See Berra v. United States,* 351 U.S. 131, 134-35, n.6 (1956).

With the adoption of the Federal Rules of Criminal Procedure, this statutory provision was transferred to Rule 31(c), which from its adoption until the present date provides:

> "*Conviction of less offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit

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[41] 17 Stat. 196. This statute provided:

> "That in all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: *Provided*, that each attempt be itself a separate offense."

This provision was maintained in Section 1035 of the Revised Statutes of the United States. Stevenson v. United States, 162 U.S. 313, 315 (1896); *see also* Historical Note to Fed. R. Crim. Proc. 31(c).

> either the offense charged or an offense necessarily included therein if the attempt is an offense."

According to the Notes of the Advisory Committee on Rules of Criminal Procedure, 29 (1945), this rule was designed as "a restatement of existing law."

In the late-nineteenth century, this Court emphasized the overriding importance of lesser-offense instructions as a procedural safeguard in criminal trials on at least three occasions. *Hopt v. Utah, supra; Wallace v. United States, supra; Stevenson v. United States, supra; see also Winston v. United States,* 172 U.S. 303, 312 (1899).

In *Stevenson,* the Court applied the statutory predecessor of Rule 31(c) and reversed a conviction for first-degree murder and a death sentence on the ground that the trial judge had erroneously refused to give a lesser-offense instruction on the crime of manslaughter. The Court held that where there was "some evidence" supporting a conviction of manslaughter rather than the charged offense of murder, it was error to refuse the lesser-offense instruction. *Id.* at 314. The Court stressed that for the judge to refuse instructions in such circumstances jeopardizes defendant's right to have the jury properly find the facts:

> "Whether the witnesses told the truth in regard to such circumstances [relating to the killing] is not for the Court to say nor is it for the Court to decide on the weight to be given to them if proper for the consideration of the jury." *Id.* at 322.
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> * * *
>
> "A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of crime

> from murder to manslaughter by reason of any absence of malice; and yet if there be *any evidence* fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter." *Id.* at 323 (emphasis added).

Thus, *Stevenson* firmly establishes that where there is "any evidence" supporting a lesser-offense verdict, a jury instruction that precludes such a verdict seriously harms a defendant's right to a fair trial.

Between the decisions in *Stevenson* and *Keeble*, this Court has reaffirmed the importance of a defendant's right to a lesser-offense instruction. *Berra v. United States*, 351 U.S. 131, 134 (1956) ("In a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense");[42] *Sansone v. United States*, 380 U.S. 343, 349-50 (1965).[43] Summarizing the rulings in *Sansone*, *Berra*, and *Stevenson*, the Court in *Keeble* reaffirmed that the lesser-offense option is a right to which a defendant is entitled if the evidence permits:

> "[I]t is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of a lesser offense and acquit him of the greater. The Federal Rules of Criminal Procedure deal with lesser included offenses, see Rule 31(c), and the defendant's right to such an instruction has been recognized in numerous decisions of this Court." 412 U.S. at 208 (footnote omitted).

Since *Keeble*, lower federal courts have held that failure to instruct the jury in the option of a lesser-offense verdict, where such an instruction is justified by the evidence, constitutes fundamental error sufficient to

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[42]The Court held in *Berra* that where the lesser offense on which petitioner sought the instruction was established by facts which were identical with those required to prove the offense charged, 351 U.S. at 134, there was no requirement that the instruction be given. Even though the offense on which the petitioner desired a lesser-offense instruction in *Berra* had a lesser penalty than the offense charged, this difference did not justify an instruction, since under each statutory offense, "the factual issues to be submitted to the jury were the same," and when "the jury resolved those issues against petitioner, its function was exhausted, since there is here no statutory provision giving to the jury the right to determine the punishment to be imposed after the determination of guilt." 351 U.S. at 135.

[43]As in *Berra*, *Sansone* held that the defendant was not entitled to a lesser-offense instruction, since such an instruction "is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-offense." 380 U.S. at 350. Because the lesser offense on which defendant in *Sansone* sought an instruction "covers precisely the same ground" as the offense charged (which carried a greater penalty), *Sansone* held that no instruction was necessary. 380 U.S. at 352-54.

warrant collateral relief.[44]

F. The weight of scholarly authority supports the availability of the lesser-offense instructions.

Another factor on which this Court has frequently relied in deciding whether a procedure should be termed a "fundamental right" is the weight of scholarly authority. *E.g., Taylor v. Kentucky, supra,* 436 U.S. at 483-84. There is no question that the proposition that lesser-offense instructions should be available for criminal defendants has overwhelming support in the scholarly community.

Thus, Section 1.07(4)-(5) of the American Law Institute's Model Penal Code specifically provides for lesser-offense instructions where "there is a rational basis for a verdict acquitting the defendant of the

[44] *E.g.*, Joe v. United States, *supra*; United States ex rel. Powell v. Pennsylvania, *supra*; United States ex rel. Matthews v. Johnson, *supra*. Recognition that the lesser-offense option is a basic right accorded defendants for their protection is also shown by rulings denying a mutual right to the government. Thus a lesser-offense instruction requested by the prosecution may be denied where the offense on which the instruction is sought is not necessarily included within the offense charged (*i.e.*, some of the elements of the lesser offense may not be indispensable, necessary elements of the offense charged). In contrast, such instructions may be given at the request of the defendant where the facts of the case may warrant a jury verdict on the lesser rather than the charged offense. United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971); United States v. Pino (No. 77-1599, 10th Cir., slip op. filed August 30, 1979, at 16-21). *Accord*, U.S. v. Stolarz, 550 F.2d 488, 492 (9th Cir.), *cert. denied*, 434 U.S. 959 (1977). In *Keeble*, the Court noted that the mutuality question was "a question that we need not now decide." 412 U.S. at 214.

offense charged and convicting him of the included offense." American Law Institute Model Penal Code §1.07(4)-(5) (Proposed Off. Draft 1962).[45] And numerous scholarly commentators have taken the position that lesser-offense verdicts where there is some evidentiary support for such a verdict is required as a matter of fundamental fairness in order to ensure that the jury can correlate the evidence to its decision on defendant's liability with optimal precision. *Comment, The Lesser Included Offense Doctrine in Iowa: The Gordian Knot Untied,* 59 IOWA L. REV. 684, n.5 (1974); Koenig, *The Many-Headed Hydra of Lesser-Included Offenses: A Herculean Task for the Michigan Courts.* 1 DETROIT COLLEGE OF LAW REVIEW 41, 52 (1975); *see also Comment, Jury Instructions on Lesser Included Of-*

[45] §1.07(4)-(5) provides in full:

"*(4) Conviction of Included Offense Permitted.* A defendant may be convicted of an offense included in an offense charged in the indictment [or the information]. An offense is so included when:

(a) it is established by proof the same or less than all the facts required to establish the commission of the offense charged; or

(b) it consists of an attempt or solicitation to commit an offense otherwise included therein; or

(c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

(5) Submission of Included Offense to Jury. The Court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."

For an explanation and discussion of the A.L.I. proposal, *see* the comments to §1.08 of the Model Penal Code (5th Tentative Draft 1956), at 40-43.

fenses, 57 NW. U. L. REV. 62, 68 (1962); *Recent Developments in The Criminal Law. The Included Offense Doctrine in California*, 10 U.C.L.A. L. REV. 870, 905 (1963); *Comment, Charging Lesser-Included Offenses in Ohio*, 14 W. RES. L. REV. 799, 811 (1963).

* * *

Thus, the lesser-offense option is a long-standing procedural device for the protection of defendants' rights and for the promotion of accurate fact-finding by criminal juries. The lesser-offense doctrine is a basic element of our criminal justice system, serving the valuable function of implementing the presumption of innocence and the beyond-a-reasonable-doubt standard. To single out capital defendants in one state for deprivation of an opportunity to receive a lesser-offense verdict is unfaithful to, and an unnecessary rejection of, the doctrine's long-standing acceptance for use in capital and non-capital cases. Alabama's selective withdrawal of the lesser-offense procedure is directed at the precise group of defendants who need its protection the most. Accordingly, this Court should hold that deprivation of the opportunity to obtain a lesser-offense verdict in a capital case violates the Due Process Clause.

II.

ALABAMA'S DEATH PENALTY LAW VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE AND THE DUE PROCESS CLAUSE BECAUSE IT IS INCONSISTENT WITH THE PRINCIPLES ESTABLISHED IN THIS COURT'S POST-*FURMAN* CAPITAL PUNISHMENT DECISIONS.

For many of the same reasons that Alabama's death penalty statute fails to satisfy Due Process require-

ments, the statute also violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.[46] The

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[46]Robinson v. California, 370 U.S. 660 (1962), which held that the requirements of the Cruel and Unusual Punishment Clause are applicable to the states pursuant to the Fourteenth Amendment's Due Process Clause, also established that the requirements of the Cruel and Unusual Punishment Clause apply not merely to the sentencing process, but also to the guilt-finding process.

In its 1976 Eighth Amendment rulings, the Court recognized that for purposes of deciding whether a particular capital punishment procedure violated the Eighth Amendment, consideration of the guilt-finding process was often necessary. Thus, in Jurek v. Texas, 428 U.S. 262 (1976), the Court specifically acknowledged the necessary interrelationship between the guilt-finding and sentencing processes. There, the plurality opinion noted with approval that Texas "requires that the jury find the existence of a statutory aggravating circumstance" at "the guilt determining stage." 428 U.S. at 270. And in Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977), Justice Blackmun stated that "it is possible that a state statute that required the jury to consider, during the guilt phase of the trial . . . relevant mitigating circumstances would pass the plurality's test." *Id.* at 641 (Blackmun, J., dissenting). And Mr. Justice Rehnquist stated in his discussion of the Eighth Amendment in his *Woodson* dissent: "One of the principal reasons why death is different is because it is irreversible; an executed defendant cannot be brought back to life. This aspect of the difference between death and other penalties would undoubtedly support statutory provisions for *especially careful review of the fairness of the trial, the accuracy of the fact-finding process*, and the fairness of the sentencing procedure where the death penalty is imposed." 428 U.S. at 323 (emphasis added). In addition, the irreversibility of the death penalty, considered in light of the Eighth Amendment, has resulted in stricter standards under the Due Process Clause, both for the guilt-finding process, *e.g.*, Reid v. Covert, *supra*, and for the sentencing process, *e.g.*, Gardner v. Florida, 430 U.S. 349 (1977); Witherspoon v. Illinois, *supra*.

statute stands alone in denying Alabama capital defendants protection that has historically been extended to such defendants and is currently the practice of every state in the union, the federal courts and Great Britain. Accordingly, there is a compelling basis for holding that the law fails to reflect "contemporary community values" and "evolving standards of decency," as the Eighth Amendment requires. *E.g., Woodson v. North Carolina, supra,* 428 U.S. at 295, 301; *see also Coker v. Georgia,* 433 U.S. 584, 595-96 (1977) (holding unconstitutional the death penalty in cases involving rape of adult women and emphasizing that Georgia "is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman"). In *Woodson,* the Court made it clear that the historical background and evaluation of a particular procedure were key factors in determining whether the procedure satisfied the "evolving standards of decency" test. 428 U.S. at 288 ("indicia of societal values identified in prior opinions include history and traditional usage"). *Woodson* also noted that "legislative enactments" in response to the Court's *Furman* decision and the degree to which most states had adopted a particular procedure were key factors in determining whether a particular procedure violated the Eighth Amendment. *Ibid. Accord, Gregg v. Georgia,* 428 U.S. 153, 179-81 (1976).

Because the Alabama statute not only diminishes the reliability of fact-finding on the issue of guilt or innocence but also jeopardizes the reliability of sentencing determinations in capital cases, it fails to meet the Eighth Amendment requirement established in

Woodson that there is a greater need for "reliability" in capital proceedings than in non-capital cases. Thus, the statute necessarily affects the sentencing process as well as the guilt-finding process, since a finding of guilt necessarily supplies an "aggravating circumstance" sufficient at the trial judge's sentencing stage to support a death sentence. By precluding lesser-offense verdicts, Alabama's law unjustifiably diverts capital juries' attention from the need to focus carefully on "the circumstances of the particular offense," as required by *Woodson,* 428 U.S. at 304, and *Lockett v. Ohio,* 438 U.S. 586, 604 (1978). *See* Point I, *supra.*

The overwhelming conviction and death sentence rate under Alabama's law proves that the law has created the "substantial risk" of "arbitrary and capricious" infliction of the death penalty which this Court has consistently warned against. *E.g., Gregg v. Georgia, supra,* 428 U.S. at 188; *Lockett v. Ohio, supra,* 438 U.S. at 601. There is just as much arbitrariness in a procedure that leads to an excessive number of convictions and death sentences as there is in a procedure that leads to so few death sentences that it is "wanton" or "freakish". *Furman v. Georgia,* 408 U.S. 238, 309, 310 (1972) (Stewart, J. concurring). As the Court made clear in *Lockett,* a capital punishment statute which precludes sufficient consideration of "circumstances of the offense proffered in mitigation" (here the probability that petitioner was guilty of only a serious, non-capital offense) creates an unacceptable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S. at 605. Alabama's law creates this precise risk and its actual operation confirms that this risk has led to the result deemed "unacceptable" in *Lockett.*

A. Alabama's law is a constitutionally invalid response to the Court's ruling in *Furman*.

In the last analysis, Alabama's law is an erroneous and constitutionally intolerable response to this Court's decision in *Furman*. As noted in *Lockett*, while *Furman* made it clear that "unguided and unrestrained discretion regarding the imposition of the death penalty in a particular capital case" was constitutionally invalid, 438 U.S. at 598, "the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." *Id.* at 599. In *Furman* itself, Chief Justice Burger (the author of the principal opinion in *Lockett*) predicted in his dissent that difficulties in assessing the lessons of *Furman* would lead some states to overreact in a fashion identical to Alabama:

> "But even assuming that suitable guidelines can be established, there is no assurance that sentencing patterns will change so long as juries are possessed of the power . . . to bring in a verdict of guilt on a charge carrying a lesser sentence; juries have not been inhibited in the exercise of those powers in the past . . .
>
> "Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. If this is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition." 408 U.S. at 401 (Burger, C.J., dissenting).

Following *Furman*, as Chief Justice Burger predicted, some states "responded to what was thought to be the command of *Furman* by adopting mandatory death penalties for a limited category of specific crimes, thus eliminating discretion from the sentencing process in capital cases." *Lockett v. Ohio, supra,* 438 U.S. at 599-600. These statutes were invalidated in *Woodson* and *Roberts (Stanislaus) v. Louisiana,* 428 U.S. 325 (1976), because they removed so much discretion from the trier of fact that they threatened the "reliability" of the capital punishment process and departed "markedly" from "evolving standards of decency" and "contemporary standards respecting the imposition of the punishment of death." *Woodson v. North Carolina, supra,* 428 U.S. at 301, 304-05.

Alabama also responded, as Chief Justice Burger feared in *Furman*, by abolishing the jury's capacity to tailor its findings to the facts with a verdict on a lesser charge. This response too is unconstitutional. Contrary to the requirements set forth in *Woodson*, the Alabama statute jeopardizes the ability of juries and sentencing judges to make reliable findings of fact in capital cases and is an aberration from well-established historical and contemporary procedural standards. No less than the statutes invalidated in *Woodson* and *Roberts*, Alabama's absolute preclusion of a lesser-offense verdict in capital cases fails "to provide a constitutionally tolerable response to *Furman's* rejection of unbridled jury discretion." *Id.* at 302.

Any doubt as to the invalidity of Alabama's approach to the problem of discretion in capital punishment is dispelled by the Court's ruling in *Gregg v. Georgia, supra.* There, the petitioner argued that

Georgia's procedures for capital punishment were inconsistent with *Furman* because they permitted the jury "to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death. . . ." *Id.* at 199. The plurality opinion in *Gregg* rejected this argument. *Gregg* flatly stated that a system for the imposition of capital punishment which, among other things, precluded lesser-offense verdicts "would be totally alien to our notions of criminal justice" and "would be unconstitutional" since they "in many respects would have the vices of the mandatory death penalty statutes we hold unconstitutional today in *Woodson*. . . ." 428 U.S. at 199-200, n.50.

The actual results of Alabama's decision to preclude lesser-offense convictions in capital cases indicate that the law does not simply "approach the mandatory laws"[47] invalidated in *Woodson*, but has had even more draconian results than such statutes. Under a mandatory death sentencing statute, as the Court noted in *Woodson*, there is every reason to believe that many capital juries will "[q]uite frequently" refuse to convict on a capital offense "because of the enormity of the sentence automatically imposed." 428 U.S. at 302. Under Alabama's law, the statistical data indicate that capital juries convict far more readily than in ordinary cases and that death sentences occur with exponentially greater frequency than historic norms. *See Woodson v.*

[47]Jurek v. Texas, *supra*, 428 U.S. at 271. Moreover, unlike any of the statutes upheld in *Gregg, Jurek* and Proffitt v. Florida, 428 U.S. 242 (1976), Alabama's law completely precludes juries from "consider[ing] on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Ibid.*

North Carolina, 428 U.S. at 295, n.31 ("Data compiled in discretionary jury sentencing of persons convicted of capital murder reveal that the penalty of death is generally imposed in less than 20% of the cases").

The lesson of this Court's post-*Furman* cases, running from *Gregg* through *Lockett* is that death penalty statutes must grant the trier of fact neither too much nor too little discretion in deciding guilt or sentence for capital defendants.[48] In *Lockett*, this Court sought to provide the "clearest guidance" and "to reconcile previously differing views in order to provide that guidance." 438 U.S. 602. *Lockett* squarely held that a capital punishment process which fails to focus carefully on "the circumstances of the particular offense" cannot, as a matter of law, satisfy the special "reliability" requirements of the Eighth Amendment. Alabama's law clearly offends that basic principle by stripping capital juries of their long-established power to tailor their verdicts to the "particular offense" which the defendant committed. In an attempt to limit the jury's discretion, the law creates an intolerable risk of unreliable fact-finding at each stage of Alabama's capital punishment process.

[48]As Mr. Justice Marshall stated in his concurrence in *Lockett*: "Achieving the proper balance between clear guidelines that assure relative equality of treatment, and discretion to consider individual factors whose weight cannot always be preassigned, is no easy task in any sentencing system. Where life itself is what hangs in the balance, a find precision in the process must be insisted upon." 438 U.S. at 620.

B. Alabama's law creates an undue risk that capital defendants such as petitioner will receive a sentence disproportionate to the seriousness of the crime.

A direct consequence of Alabama's statute in cases such as petitioner's is that there is a substantial risk that capital juries will find defendants guilty of a capital crime even though there is considerable doubt whether the defendant had any purpose to kill the victim or to assist in his death. Precluding the jury from considering lesser offenses necessarily has the effect of diverting the jury's attention from the intent-to-kill element essential to the crime with which petitioner was charged. In order to avoid a decision to free petitioner in the face of a serious crime in which the victim was killed, the jury may well convict on the capital offense without carefully focusing in the intent-to-kill element which distinguishes the capital offense from lesser-included non-capital offenses of which it was not advised, such as felony murder. Thus, the statute encourages conviction of defendants who may not themselves have killed or intended to kill.[49]

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[49]This situation was exacerbated in this case because the crime for which petitioner was convicted—"robbery or attempts thereof when the victim has intentionally been killed by the defendant"—has been construed to permit conviction of defendants who did not actually kill the defendant, but were mere accomplices or aiders and abetters of the person who actually perpetrated the killing. Ritter v. State, 375 So.2d 270 (Ala. 1979). Further confusion was engendered in petitioner's case when the trial judge gave the jury an aider-and-abetter and conspiracy instruction which did not focus clearly on the necessity for the jury to find that petitioner had the requisite intent to kill. *See* Statement of the Case, *supra*.

As a result of the distortion it creates, Alabama's statute is necessarily at odds with the Eighth Amendment rule endorsed in the plurality opinion in *Coker v. Georgia*, 433 U.S. 584, 592 (1977), that a punishment is unconstitutionally disproportionate if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or . . . is grossly out of proportion to the severity of the crime." The question whether capital punishment may be imposed without a clear-cut finding that the defendant "intended to take life" was expressly reserved in Chief Justice Burger's opinion in *Lockett*, 438 U.S. at 609, n.16, but answered in the negative in the *Lockett* concurrences of Mr. Justice White (438 U.S. at 624-28) and Mr. Justice Marshall (438 U.S. at 619-21).

Under Alabama's law and the trial judge's charge, petitioner's conviction and sentence of death may well turn "on fortuitous events that do not distinguish the intention or moral *culpability* of the defendant"[50] (*i.e.*, the unexpected knife assault on the victim in petitioner's presence by petitioner's robbery accomplice). The infliction of death upon petitioner where there is evidence that he may well have had "no intent to bring about the death of the victim" and where the jury was diverted from focusing on the intent element is "not only grossly out of proportion to the severity of the crime but also fails to contribute significantly to acceptable, or, indeed, any perceptible goals of punishment.[51] Accordingly, the operation of Alabama's death

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[50]Lockett v. Ohio, *supra*, 438 U.S. at 620 (Marshall, J., concurring).

[51]*Id.* at 626 (White, J., concurring in the judgment).

penalty statute creates the grave possibility that a virtually unreviewable substantive violation of the excessive punishment doctrine will occur.

* * *

In sum, Alabama's law on its face, and as applied in this case, is contrary to the Eighth Amendment principles established by this Court in each of the major post-*Furman* Eighth Amendment cases.

III.

ALABAMA'S DEATH PENALTY STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT SINGLES OUT CAPITAL DEFENDANTS FOR DEPRIVATION OF A WELL-ESTABLISHED PROCEDURAL RIGHT WHICH IT CONTINUES TO MAKE AVAILABLE IN NON-CAPITAL CASES.

By withdrawing from capital defendants the protection accorded by availability of a lesser-offense instruction and by continuing to make that instruction available in all non-capital cases, Alabama has established a discriminatory classification which also fails to comply with the Equal Protection Clause. Alabama's death penalty law singles out capital defendants for the deprivation of a right well established in Alabama law and one which remains available in Alabama non-capital cases. Because of the serious procedural disability which the Alabama law imposes on capital defendants and the lack of any supportable rationale for Alabama's discrimination between capital and non-capital defendants,

there is no basis for concluding, as this Court's Equal Protection decisions require, that Alabama's classification is either "reasonable" or has a "fair and substantial relation to the object of the legislation." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

Alabama's law plainly jeopardizes what this Court has held are "fundamental rights" in "fairness of the fact-finding process" and the right to have a jury decide guilt or innocence without "an unacceptable risk . . . of impermissible factors coming into play." *Estelle v. Williams, supra,* 425 U.S. at 503, 504, 505. As noted in Point I, *supra*, this Court, as well as Alabama's own courts, has long recognized the critical importance in the jury trial process of the lesser-offense instruction. Moreover, as recognized in *Keeble*, absolute deprivation of lesser-offense instructions creates precisely the risk of fact-finding errors which were stressed in this Court's decisions in *Winship* and *Estelle*. In so doing, Alabama's law strikes at the core of capital defendants' "fundamental rights."

Because of the Alabama law's discrimination against Alabama capital defendants concerning their fundamental rights, this Court's applicable equal protection precedents require that Alabama's decision to single out capital defendants must be strictly scrutinized in order to determine whether it is "necessary to promote a compelling govermental interest." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). *Accord, Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Dunn v. Blumstein*, 405 U.S. 330, 338-43 (1972); *Lindsey v. Normet*, 405 U.S. 56, 73 (1972). Alabama's statute does not withstand

scrutiny under this standard.[52]

Alabama has conceded that the preclusion of lesser-included offenses is not constitutionally required.[53] The only interest that the state has ever asserted in support of its statutory discrimination against capital defendants is that it "is the most effective means of insuring that de facto jury discretion does not make the operation of a death penalty statute" inconsistent with this Court's ruling in *Furman* and that it "serves important constitutional goals."[54] Alabama has never suggested the desirability or even rationality of taking this extreme step in non-capital cases.

The decision to preclude lesser-offense instructions is neither a "necessary" nor appropriate means to promote Alabama's objective of serving the constitutional goals established in the *Furman* opinions. In *Gregg* and its companion cases, this Court flatly held that the concerns expressed in the *Furman* opinions regarding wanton, freakish, or effectively discriminatory capital

[52]Another reason for applying the strict standard of equal protection review is that Alabama's law singles out a group—capital defendants—which may be appropriately regarded as a "discrete and insular minority" lacking, due to their "special condition," the inability to readily invoke the "political processes ordinarily to be relied upon to protect minorities." United States v. Carolene Products Co., 304 U.S. 144, 152-53, n.4 (1938). Where legislation singles out such a minority, "strict" scrutiny is ordinarily applied. *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971).

[53]*See* Respondent's Brief in Opposition to Petition for Writ of Certiorari, Jacobs v. Alabama (U.S. October Term 1978, No. 78,5696), at 24.

[54]*Ibid.* at 27.

punishment schemes could be satisfied by statutes which permit juries to receive lesser-offense instructions on the issue of guilt. *Gregg v. Georgia*, 428 U.S. at 163, 199 (1976); *Proffitt v. Florida*, 428 U.S. 242, 254 (1976); *Jurek v. Texas*, 428 U.S. 262, 274 (1976). Indeed the *Gregg* plurality opinion of Justices Stewart, Powell and Stevens stated that a system for capital punishment which eliminated lesser-offense instructions would be "totally alien to our notions of criminal justice." 428 U.S. at 199-200, n.50. Thus, it is now obvious that *Furman* does not necessitate that the states must interfere with the jury's fact-finding by eliminating lesser-offense instructions on the issue of guilt.

In any event, in light of the widely recognized function that lesser-offense verdicts perform in eliminating the risk of fact-finding error by juries, it is equally obvious that there is no "compelling" government interest in the absolute preclusion of such instructions. Indeed, Alabama openly acknowledged this fact in 1977 by reenacting a lesser-included offense statute for non-capital cases.[55]

What is more, this Court's decisions in *Gregg, Proffitt* and *Jurek* firmly establish that there are less restrictive means available to meet Alabama's objective of having a capital sentencing structure which meets constitutional requirements. Neither Georgia, Florida, nor Texas (nor for that matter any other state) has abolished lesser-offense verdicts in capital cases, as their capital punishment provisions have been approved in principle by this Court. Thus, Alabama's law offends the well-established

[55]§13A-1-9, Alabama Code (1978). This new statute does not go into effect until 1980. §13A-1-7, Code of Alabama (1979 Supplement).

principle that statutes affecting constitutional rights "must be drawn with 'precision' " and must be " 'tailored' to serve their legitimate objectives." *Dunn v. Blumstein, supra,* 405 U.S. at 343. Where, as is plainly the case here, there are "other, reasonable ways to achieve [its] goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." *Ibid. Accord, Zablocki v. Redhail, supra,* 434 U.S. at 388-90.[56]

In sum, Alabama's law constitutes a discriminatory classification wholly unnecessary to achieve either the constitutional objectives which this Court specified in *Furman* or any other significant penological or fact-finding objectives.

Even if this Court rejects the argument for "strict" equal protection review and applies a standard of equal protection review less strict than that set forth in the *Shapiro, Dunn,* and *Zablocki* line of cases, Alabama's

[56]Alabama's argument that preclusion of lesser-offense instructions is a laudable means of promoting more accurate jury's fact-finding on the issue of guilt, Respondent's Brief in Opposition to Petition for Writ of Certiorari, n.51, *supra,* at 25, applies at least as strongly to serious non-capital cases involving crimes such as first-degree murder which carry life sentences as to capital cases. Alabama's law is fatally "underinclusive" and thus fails to meet yet another requirement of this Court's cases which apply "a strict equal protection test." *E.g.*, Zablocki v. Redhail, *supra*, 434 U.S. at 390; Shapiro v. Thompson, *supra*, 394 U.S. at 635. Under the strict equal protection standard of review, where a statute sweeps too narrowly and does not affect numerous persons who are logically covered by its purported rationale, it must be invalidated. The decision to single out capital defendants is therefore invalid.

statutory decision to discriminate against capital defendants should still be invalidated. Where this Court does not apply the "strict" standard of review, the Equal Protection Clause nonetheless requires that the statutory classification must be "reasonable," and must have a "fair and substantial relation to the objective of the legislation." *Reed v. Reed, supra,* 404 U.S. at 75-76. In addition, the purpose of the legislation must be "legitimate and nonillusory." *McGinnis v. Royster,* 410 U.S. 263, 276 (1973).

Applying the less strict standard of review, this Court has frequently invalidated statutes which single out one category of criminal defendants for the deprivation of a significant procedural safeguard to which other defendants remain entitled. Thus, in *Mayer v. City of Chicago,* 404 U.S. 189 (1971), the Court held that making transcripts freely available to felony defendants for appeals—but not to non-felony defendants—was an "unreasoned distinction." *Id.* at 196. In finding a violation of the Equal Protection Clause, the Court rested its conclusion on the fact that the ability of a defendant to afford transcripts "bears no more relationship to his guilt or innocence in a non-felony than in a felony case." *Ibid.*[57] Applying that same reasoning here, the fact that capital defendants may be sentenced to death and non-capital defendants may not bears no relationship to the question of whether the elimination of procedural safeguards is appropriate on the question of guilt or innocence in a capital case. Indeed, as shown

[57]*See also* Griffin v. Illinois, 351 U.S. 12, 17-18 (1956), and cases cited in Mayer v. City of Chicago, *supra*, 404 U.S. at 193 n.4.

in Point I, this Court has consistently held that capital defendants require more, not less, procedural protection. *Accord, In re Brown*, 439 F.2d 47 (3d Cir. 1971) (holding that equal protection violated by law withholding absolute right of appeal from juvenile defendants while allowing appeals to all other criminal defendants); *Powers v. Schwartz*, 448 F. Supp. 54 (S.D. Fla. 1978), *vacated as moot*, 587 F.2d 783 (5th Cir. 1979) (holding equal protection violated by law absolutely denying bail to felony defendants charged with offenses punishable by life imprisonment or death while extending bail to other defendants).

Similarly, *Baxstrom v. Herold*, 383 U.S. 107 (1966), held that New York violated the Equal Protection Clause by withholding the right to jury trial from criminals confined in prison whom the state sought to commit to state mental institutions at the end of their prison terms while granting such rights to other persons whom the state sought to commit civilly. After making it clear that it was not applying the "strict" standard of review, the Court held that while it was reasonable to distinguish the criminally insane from the civilly insane for purposes of deciding what types of commitment treatment were appropriate, this distinction had "no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*" (emphasis in original). 383 U.S. at 111. By a parity of reasoning, Alabama's statute must be declared invalid. Even if it is reasonable to distinguish among capital and non-capital defendants for purposes of sentencing, this distinction has no relevance in the context of the question of whether a capital defendant is guilty "*at all.*" The notion advanced by Alabama that it should be permitted to strip capital defendants of a procedural protection on the issue of guilt, which that state has repeatedly reaffirmed as fundamental to its criminal justice system, is at least as "untenable" as the classification invalidated in *Baxstrom*. 383 U.S. at 114.

In reliance on the *Baxstrom* ruling, the Court in *Jackson v. Indiana*, 406 U.S. 715 (1972), held that the Equal Protection Clause was violated by Indiana's more lenient standard for civil mental health commitment and more stringent standard of release for criminal defendants found incompetent to stand trial than for all other civil commitment defendants. *Jackson* stressed: "If criminal correction and imposition of sentence [as in *Baxstrom*] are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice." 406 U.S. at 724. Because Alabama's law deprives capital defendants of valuable procedural protection available to all others merely on the basis of the prosecutor's discretionary decision to file a capital, rather than a non-capital, charge, it has precisely the constitutional defect condemned in *Jackson*.[58]

[58] In Humphrey v. Cady, 405 U.S. 504, 512 (1972), this Court stated: "The equal protection claim would seem to be especially persuasive if . . . petitioner was deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other." This is precisely what occurs in Alabama. Were petitioner indicted for first-degree murder, he would certainly have received a lesser-offense instruction. Only because the prosecutor invoked the special capital punishment statute was petitioner deprived of the protection accorded by the lesser-offense option.

The fundamental defect in Alabama's recent withdrawal from capital defendants of the right to have juries consider a lesser-offense verdict is that it is based on an objective which fails to meet the test that it be "legitimate and non-illusory." *McGinnis v. Royster, supra,* 410 U.S. at 276. Rather, Alabama's death penalty "reform" is predicated on nothing more than a misreading of this Court's decision in *Furman*. Since *Furman* did not require the abolition of lesser-offense instructions in capital cases, as this Court expressly held in *Gregg*, the Alabama law is obviously based on an "illusory" premise. The fact that Alabama has steadfastly maintained the lesser-offense option for all felony defendants (including those charged with first-degree murder) also demonstrates that the objective of denying the right to capital defendants, whose very lives are at stake, is not legitimate. Indeed, it is unconscionable to consistently reaffirm the necessity for granting a procedural safeguard to all defendants, as Alabama has done, except those whose very lives are at stake. The utter irrationality of Alabama's selective withdrawal of the lesser-offense procedure is underscored by the extraordinary conviction and death sentence rate that has occurred during the operation of Alabama's new law. The conclusion is thus inescapable that Alabama's law subverts rather than promotes the objective of fair treatment of capital defendants and is a thoroughly irrational means of furthering the goals of its criminal justice system.

Accordingly, even if this Court does not reach the question of whether Alabama's law violates the Due Process Clause of the Fourteenth Amendment or the Cruel and Unusual Punishment Clause of the Eighth Amendment, there are compelling grounds for holding that the law violates the Equal Protection Clause. By so

holding, this Court would merely reaffirm the well-established principle that capital defendants must be given at least the same procedural protection as non-capital defendants.

IV.

THE EVIDENCE WOULD HAVE SUPPORTED A VERDICT OF GUILT ON A LESSER-INCLUDED NON-CAPITAL OFFENSE HAD THIS ALTERNATIVE NOT BEEN PRECLUDED BY ALABAMA'S DEATH PENALTY STATUTE.

Were it not for Alabama's statutory preclusion of lesser-offense instructions in capital cases, petitioner would have been entitled to such an instruction. At the very least, the trial court, if it had not been foreclosed by the death penalty statute, would have charged the jury on the lesser-included, non-capital offenses of first-degree murder (which does not require a finding that the defendant intended that the victim be killed), second-degree murder, and robbery.[59]

A jury may find a defendant guilty of any offense which is lesser than the offense charged and is necessarily included within the offense charged, under Ala-

[59]At the time of petitioner's trial in 1977, the offense of first-degree or felony murder was punishable by life imprisonment. §13-1-74, Code of Alabama (1975). The crime of second-degree murder was punishable by not less than 10 years. *Ibid.* The crime of robbery was punishable by not less than 10 years. §13-3-110, code of Alabama (1975). In 1977, Alabama revised its criminal code. This revision abolished the distinction in the 1975 code between first-degree and second-degree murder. §13A-6-2, Code of Alabama (1978), and further provided that the crime of murder where there was no capital charge was punishable for not less than 10 years. §13A-6-2(c). This revision also established three different degrees of the crime of robbery. §§13A-8-41 to 43, Code of Alabama (1978). These revisions are not effective until 1980. §13A-1-7, Code of Alabama (1979 Supplement).

bama's statute applicable in non-capital cases.[60] The Alabama courts have held that a defendant accused of the "greater offense is entitled to have the court charge on the lesser offenses included in the indictment if

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[60]Alabama's lesser-offense statutory provision governing non-capital cases provides as follows: "When an indictment charges an offense of which there are different degrees, the jury may find the defendant not guilty of the degree charged and guilty of any degree inferior thereto or of an attempt to commit the offense charged; and the defendant may also be found guilty of any offense which is necessarily included in that with which he is charged whether it be a felony or a misdemeanor." §15-17-1, Code of Alabama (1975). This statute will be superseded in 1980, *see* §13A-1-7, Code of Alabama (1979 Supplement), by a provision on lesser-offense instructions almost identical to §1.07(4)-(5) of the Model Penal Code. Thus, §13A-1-9, Alabama Code (1978) provides:

> (a) A defendant may be convicted of an offense included in an offense charged. An offense is an included one if:
>
> (1) It is established by proof of the same or fewer than all the facts required to establish the commission of the offense charged; or
>
> (2) It consists of an attempt or solicitation to commit the offense charged or to commit a lesser included offense; or
>
> (3) It is specifically designated by statute as a lesser degree of the offense charged; or
>
> (4) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interests, or a lesser kind of culpability suffices to establish its commission.
>
> (b) The court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense.

there is any reasonable theory from the evidence which would support" such a charge. *Fulghum v. State*, 277 So.2d 886, 890 (Ala. 1973). Only if there is "an entire absence of evidence" tending to show that the accused was guilty of the lesser rather than greater offense may the instruction be refused. *Davis v. State*, 19 So.2d 358, 360 (Ala. 1944). Thus, if there is "*any* evidence, however weak, insufficient, or doubtful in credibility" supporting the lesser-offense finding, the charge must be given. *Davis v. State*, 19 So.2d 356, 358 (Ct. App. Ala. 1944), and cases cited therein. In determinging what lesser offenses are included in the crime charged, Alabama courts ordinarily analyze the elements of that crime and determine whether the elements of any lesser offense are included therein.[61]

Application to petitioner's case of these standards demonstrates that lesser-offense instructions would have been plainly proper had the trial judge not been precluded by statute from giving them.

Thus, petitioner was charged with the capital crime of "robbery . . . when the victim is intentionally killed by the defendant." §13-11-2(a)(2). As held by the Alabama Supreme Court, the elements of this crime are (a) robbery; (b) the killing of the victim during the robbery; and (c) an intent on the part of the defendant to kill the victim. *Clements v. State*, 370 So.2d 723 (Ala. 1979); *Ritter v. State*, 375 So.2d 270 (Ala. 1979). The Alabama courts have especially stressed the importance of the intent-to-kill element of this capital crime,

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[61]*E.g.*, Harrison v. State, 340 So.2d 849, 853 (Ala. Crim. App.), *cert. denied*, 340 So.2d 854 (Ala. 1976); Sharpe v. State, 340 So.2d 885, 887 (Ala. Crim. App.), *cert. denied*, 340 So.2d 889 (Ala. 1976).

holding that it is not sufficient merely to show that the defendant intended to carry out a robbery, or even that the defendant "should have known that there was a substantial possibility that someone would be killed." *Ritter v. State, supra,* 375 So.2d at 273-74.

Under Alabama law, felony murder would be a lesser-included offense in cases, such as this, where the defendant is charged with robbery-intentional killing. Felony murder is not a capital offense, and is classified as first-degree murder.[62] Felony murder contains each of the elements of the crime of robbery-intentional killing with which petitioner was charged except for the intent-to-kill element. *E.g., Hardley v. State,* 202 Ala. 24, 79 So. 363 (1918). Thus, in a felony murder case involving a robbery, while the state must establish that the defendant was guilty of robbery and that a homicide occurred during the robbery, it does not have to show (as it did in petitioner's capital case) that the defendant "should have contemplated, intended, or willed the death of the victim." *Ritter v. State, supra,*

[62]Alabama's first-degree murder statute applicable to petitioner's crime provides that "murder in the first degree" includes homicides "committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery or burglary. . . ." §13-1-70, Code of Alabama (1975). The Alabama courts have thus held that "in this state felony-murder is statutorily classified as murder." Ritter v. State, *supra*, 375 So.2d at 274. *Accord*, Garrett v. State, 369 So.2d 833, 837 (Ala. 1979) ("felony murder . . . is included in the statutory definition of murder in the first degree").

375 So.2d at 273, and cases cited therein.[63] All that need be shown for the crime of felony murder involving robbery is that the defendant intended to commit "an inherently dangerous felony—one in which he should have known that there was a substantial possibility that someone would be killed." *Ibid.* That felony murder is a lesser-included offense to the capital crime of robbery-intentional killing is confirmed by the death penalty statute itself, which provides:

> "Evidence of intent under this section shall not be supplied by the felony-murder doctrine." §13-11-2(b).[64]

The evidence at petitioner's trial amply supported a charge on the lesser offense of felony murder. Although petitioner admitted his participation in the robbery and that his accomplice fatally attacked the victim during the robbery, he vigorously denied that he either killed the victim or that he contemplated intended, or willed the victim's death. Indeed, petitioner testified that his accomplice's knife assault on the victim occurred

[63]The Alabama courts, in construing the capital offense of "robbery . . . when the victim is intentionally killed by the defendant" have also held that it is not necessary to show that the defendant personally killed the victim. Thus, the Alabama Supreme Court has held that an accomplice may be found guilty of this capital offense if the jury concludes that the defendant "has sanctioned and facilitated the crime so that his culpability [for intentional killing] is comparable to that of the principal." Ritter v. State, *supra*, 375 So.2d at 274. Even in the case where the defendant did not actually kill the victim (as petitioner testified here), the State must still show that he had "the particularized intent" that the victim be killed. *Id.* at 274.

[64]*See* Evans v. State, 361 So.2d 666, 667 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979).

unexpectedly and that he protested as soon as he saw what his accomplice had done. Thus, there was more than the requisite "slight" evidence that the element of intent-to-kill was absent and that petitioner was guilty of no more than felony murder. Accordingly, a charge on the non-capital offense of felony murder would have been proper had the trial judge not been precluded from giving such an instruction. *E.g., Davis v. State, supra,* 19 So.2d at 358.

Apart from the offense of first-degree or felony murder, petitioner also would have been entitled to a charge of the additional lesser offense of second-degree murder. The Alabama courts have held that in cases where the jury is instructed on the crime of first-degree murder (which, as noted above, includes felony murder), it must also be instructed on the crime of second-degree murder. *E.g., Jackson v. State,* 226 Ala. 72, 145 So. 656 (Ala. 1933). *See also Houlton v. State,* 254 Ala. 1, 48 So.2d 7 (Ala. 1950).[65]

Finally, petitioner qualified for an instruction on the lesser offense of robbery alone. Robbery is an indispensable, necessary element of the capital crime with which petitioner was charged. *Clements v. State, supra;*

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[65]Second-degree murder has been defined by the Alabama courts as the unlawful killing of a human being with malice, but without deliberation or premeditation. *E.g.*, Harris v. State, 56 Ala. App. 301, 321 So.2d 267 (Ala. Crim. App. 1975). Moreover, §13-1-73, Alabama Code (1975), in effect for crime committed on the date of petitioner's offense provides in pertinent part:

> "When the jury finds the defendant guilty under an indictment for murder, they must ascertain by their verdict whether it is murder in the first or second degree. . . "

Ritter v. State, supra, 375 So.2d at 275. There is evidence to support a conclusion that petitioner was guilty only of robbery and not of the greater offense of felony murder. As noted earlier, in a felony murder case involving robbery where the defendant himself did not kill or intend the death of the victim, the defendant may be found guilty only if the jury determines that the defendant intended to commit "an inherently dangerous felony—one in which he should have known that there was a substantial possibility that someone would be killed." *Ritter v. State, supra,* 375 So.2d at 273-74. There was no evidence that petitioner knew that his accomplice was armed. Moreover, petitioner testified that he had no prior knowledge that the victim would be killed and that he was shocked when his accomplice attacked the victim with a knife. Thus, there was certainly "some evidence" to support a jury conclusion that petitioner had no basis for knowing that there was a substantial possibility that someone would have been killed. The jury should have had an opportunity to find that defendant was not even guilty of felony murder, but only of robbery.[66]

In sum, there is no question that the evidence would have supported a lesser-offense instruction under applicable Alabama law were it not for the death penalty statute's absolute preclusion of such an instruction.

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[66]Under Alabama common law applicable to offenses (such as petitioner's) occurring before May, 1978, the elements of the offense of robbery are (a) the unconsented taking of the property of another, (b) from his person or his presence, (c) by violence or by putting in fear and (d) with a larcenous intent. *E.g.*, Martin v. State, 51 Ala. App. 405, 286 So.2d 80 (Ala. Crim. App. 1973).

CONCLUSION

For the reasons stated herein, the judgment of the Supreme Court of Alabama affirming petitioner's conviction and sentence of death should be reversed.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. THE ALABAMA DEATH PENALTY STATUTE:

Chapter 11 of title 13 of the Code of Alabama (1975), section 13-11-1 through section 13-11-9 provides:

§ 13-11-1. LIMITATION ON IMPOSITION OF DEATH PENALTY OR LIFE SENTENCE WITHOUT PAROLE.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, § 1.)

§ 13-11-2. AGGRAVATED OFFENSES FOR WHICH DEATH PENALTY TO BE IMPOSED; FELONY-MURDER DOCTRINE NOT TO BE USED TO SUPPLY INTENT; DISCHARGE OF DEFENDANT UPON FINDING OF NOT GUILTY; MISTRIALS; REINDICTMENT AFTER MISTRIAL.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nightime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state

trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand

jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty, of not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2.)

§ 13-11-3. HEARING AS TO IMPOSITION OF DEATH PENALTY OR LIFE SENTENCE WITHOUT PAROLE AFTER CONVICTION; ADMISSIBILITY OF EVIDENCE; RIGHT OF STATE AND DEFENDANTS TO PRESENT ARGUMENTS.

If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any

hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3.)

§ 13-11-4. DETERMINATION OF SENTENCE BY COURT; COURT NOT BOUND BY PUNISHMENT FIXED BY JURY.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

§ 13-11-5. CONVICTION AND SENTENCE OF DEATH SUBJECT TO AUTOMATIC REVIEW.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5.)

§ 13-11-6. AGGRAVATING CIRCUMSTANCES.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowlingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6.)

§ 13-11-7. MITIGATING CIRCUMSTANCES.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

§ 13-11-8. APPOINTMENT OF EXPERIENCED COUNSEL FOR INDIGENT DEFENDANTS.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8.)

§ 13-11-9. EFFECTIVE DATE.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10.)

5. THE ALABAMA LESSER INCLUDED OFFENSE STATUTE:

Section 15-17-1 of Chapter 17, title 15 of the Code of Alabama provides:

§ 15-17-1. VERDICT MAY BE FOR LESSER OFFENSE THAN CHARGED; VERDICT FOR OFFENSES INCLUDED IN OFFENSE CHARGED.

When an indictment charges an offense of which there are different degrees, the jury may find the defendant not guilty of the degree charged and guilty of any degree inferior thereto or of an attempt to commit the offense charged; and the defendant may also be found guilty of any offense which is necessarily included in that with which he is charged, whether it be a felony or a misdemeanor. (Code 1852, § 647; Code 1867, § 4199; Code 1876, § 4904; Code 1886, § 4482; Code 1896, § 5306; Code 1907, § 7315; Code 1923, § 8697; Code 1940, T. 15, § 323.)

6. THE ALABAMA STATUTE REQUIRING THE JURY TO FIND THE DEGREE OF MURDER:

Section 13-1-73 of Chapter 1, title 13 of the Code of Alabama provides:

§ 13-1-73. JURY TO FIND DEGREE.

When the jury finds the defendant guilty under an indictment for murder, they must ascertain by their verdict whether it is murder in the first or second degree; but if the defendant on arraignment confesses his guilt, the court must proceed to determine the degree of the crime, by the verdict of a jury, upon an examination of the testimony, and pass sentence accordingly. (Code 1852, § 115; Code 1867, § 3657; Code 1876, § 4299; Code 1886, § 3728; Code 1896, § 4857; Code 1907, § 7087; Code 1923, § 4457; Code 1940, T. 14, § 317.)

APPENDIX B

The following is a compilation of statutes, rules of procedure and case law which establish that lesser offense instructions and lesser offense convictions are permitted in all fifty states and Puerto Rico.

ALABAMA

ALA. CODE § 13A-1-9(a) (1978) (formerly ALA. CODE § 13-9-3 and § 15-7-1 (1975)) provides that a defendant may be convicted of a lesser included offense. ALA. CODE § 13A-5-31(a) (1978) provides that capital offenses "shall not include any lesser offenses."

ALA. CODE § 13A-1-9(b) (1978) provides that the court "shall not" instruct on lesser offenses "unless there is a rational basis" for conviction of the lesser included offense.

See, e.g., Harrison v. *State,* 340 So.2d 849 (Ala. Crim. App.), *cert. denied,* 340 So.2d 854 (Ala. 1976).

ALASKA

ALASKA R. CR. P., Rule 31(c), ALASKA RULES OF COURT (1979) provides that the defendant may be convicted of a lesser included offense.

See, e.g., Christie v. *State,* 580 P.2d 310 (Alaska 1978).

ARIZONA

ARIZ. R. CR. P., Rule 23.3, ARIZ. RULES OF COURT (West, 1979) provides: "Forms of verdicts shall be submitted to the jury for all offenses necessarily included. . . . The defendant may not be found guilty of any offense for which no form of verdict has been submitted to the jury.").

See, e.g., State v. *Valencia,* 121 Ariz. 191, 589 P.2d 434 (1979).

ARKANSAS

ARK. STAT. ANN. § 41-105(2) (Supp. 1976) provides that the defendant may be convicted of a lesser included offense).

ARK. STAT. ANN. § 41-1301(2) (1975) provides: "If the defendant is found not guilty of the capital offense charged, but guilty of a lesser included offense. . . ."

ARK. STAT. ANN. § 41-105(3) (Supp. 1976) provides that the court shall not be obligated to instruct on lesser included offenses "unless there is a rational basis for . . . acquitting . . . of the offense charged and convicting . . . of the included offense."

See, e.g., Westbrook v. *State,* 580 S.W.2d 702 (Ark. 1979).

CALIFORNIA

CAL. PENAL CODE § 1159 (West 1970) provides that the defendant may be found guilty of a lesser included offense.

See, e.g., People v. *Preston,* 9 Cal.3d 308, 107 Cal. Rptr. 300, 508 P.2d 300 (1973).

COLORADO

COLO. REV. STAT. § 18-1-408(5) (1973) provides that the defendant may be convicted of a lesser included offense. *Accrod,* Colo. R. CR. P., R. 31(c) (1973).

See, e.g., People v. *White,* 553 P.2d 68 (Colo. 1976).

CONNECTICUT

CONN. GEN. STAT. ANN. § 53(a)-45(d) (West 1958) provides that a defendant charged with murder may be found "guilty of homicide in a lesser degree. . . ."

See, e.g., State v. *Brown,* 173 Conn. 254, 377 A.2d 268 (1977).

DELAWARE

DEL. CODE ANN. tit. 11, § 206(b) (1974) provides that the defendant may be convicted of a lesser included offense. *Accord,* DEL. CT. COMMON PLEAS CR. R., Rule 31(c) (1974).

DEL. CODE ANN. til. 11, § 206(c) (1974) provides that the court is not obligated to instruct on a lesser included offense unless there is a rational basis for conviction of only the lesser offense.

See, e.g., Matthews v. *State,* 310 A.2d 645 (Del. 1973).

. . . the possibility of a verdict of guilty of a lesser included offense" was "entirely inappropriate" 310 A.2d at 646).

FLORIDA

FLA. R. CR. P., Rule 3.510, FLA. STAT. ANN. (West 1973) provides that the jury may convict defendant of any offense necessarily included in any offense charged; "[t]he court shall charge the jury in this regard."

See, e.g., State v. *Terry,* 336 So.2d 65 (Fla. 1976).

GEORGIA

GA. CODE ANN. § 26-505 (1977) provides that the defendant may be convicted of a lesser included offense.

See, e.g., Loury v. *State,* 147 Ga. App. 152, 248 S.E.2d 291 (1978).

HAWAII

HAWAII REV. STAT. § 701-109(4) (1976) provides that defendant may be convicted of a lesser included offense.

HAWAII REV. STAT. § 701-109(5) (1976) provides that the court is not obligated to instruct on lesser included offenses unless there is a rational evidentiary basis for conviction of only the lesser offense.

See, e.g., State v. *Travis,* 45 Hawaii 435, 368 P.2d 883 (1962).

IDAHO

IDAHO CODE § 19-2312 (1979) provides that the defendant may be found guilty of any necessarily included offense.

See, e.g., State v. *Beason,* 95 Idaho 267, 506 P.2d 1340 (1973).

ILLINOIS

ILL. REV. STAT. ch. 38, § 2-9 (1973) defines included offense.

See, e.g., People v. *Simpson,* 57 Ill. App. 2d 442, 15 Ill. Dec. 463, 373 N.E.2d 809 (1978).

INDIANA

IND. CODE ANN. § 35-41-1-2 as amended by 1978 Ind. Acts,

P.L. 144, § 2, defines included offense.

IND. CODE ANN. § 35-1-35-1 (Burns 1975) provides that in its charge to the jury the court must state "all matters of law which are necessary for their information in giving their verdict").

See, e.g., Pruitt v. *State,* 382 N.E.2d 150 (Ind. 1978).

IOWA

IOWA CODE ANN. § 813.2, R. 21(3) (West, 1979) provides that the defendant may be convicted of a necessarily included offense. *Accord,* Iowa R. CR. P., R. 6(2), IOWA CODE ANN. (West, 1979).

IOWA R. CR. P., Rule 6(3), IOWA CODE ANN. (West, 1979) provides that the trial court has the duty to instruct on "all lesser offenses of which the accused might be found guilty . . . upon the evidence adduced," even if the instruction is not requested).

See, e.g., State v. *Rand,* 268 N.W.2d 642 (Iowa 1978).

KANSAS

KAN. STAT. ANN. § 21-3107(2) (1975) provides that the defendant may be convicted of an included crime.

KAN. STAT. ANN. § 21-3107(3) (1975) provides that the court has the duty to instruct on "all lesser crimes of which the accused might be found guilty . . . upon the evidence adduced, even though such instructions have not been requested or have been objected to."

See, e.g., State v. *Higdon,* 224 Kan. 720, 585 P.2d 1048 (1978) (the trial court has the affirmative duty to instruct on lesser included offenses, whether or not requested, if there is some evidence which would support conviction of the lesser offense; there is no such duty if the evidence excludes a theory of guilt on the lesser offense).

KENTUCKY

KY. REV. STAT. § 505.020(2) (1975) provides that the defendant may be convicted of any offense included in the offense charged. *Accord,* KY. TRIAL R., Rule 9.86, KY. REV. STAT. (1971).

See, e.g., Martin v. *Commonwealth,* 571 S.W.2d 613 (Ky. 1978).

LOUISIANA

LA. CODE CRIM. PRO. ANN. art. 814 (West Supp. 1979) defines "responsive verdicts" as including lesser offenses included in specific offenses.

LA. CODE CRIM. PRO. ANN. art. 815 (West, 1967) provides that a verdict of guilty of a lesser degree or lesser included offense is a responsive verdict for crimes not specifically provided for in article 814.

See, e.g., State v. *Martin,* 351 S.2d 92 (La. 1977).

MAINE

ME. REV. STAT. tit. 17-A, § 13A(2), (1979 Me. Legis. Serv. defines "lesser included offense").

ME. TRIAL R., Rule 31(c), ME. RULES OF COURT (West, 1979) provides that the defendant may be found guilty of a necessarily included offense.

ME. REV. STAT. tit. 17-A, § 13A(1), (1979 Me. Legis. Serv.) provides that the court shall instruct only on lesser included offenses supported by a rational evidentiary basis if so requested by either party or at the court's discretion. *See also* ME. REV. STAT. tit. 17-A, § 13A(3), (1979) Me. Legis. Serv.

See, e.g., State v. *Stoddard,* 289 A.2d 33 (Me. 1972).

MARYLAND

MD. R. P., Rule 757(b), MD. ANN. CODE (Supp. 1979), provides that "[t]he court may, and . . . [upon] request . . . shall, give . . . instructions . . . as correctly state the applicable law").

See, e.g., Blackwell v. *State,* 278 Md. 466, 365 A.2d 545 (1976),

cert. denied, 431 U.S. 918 (1977).

MASSACHUSETTS

MASS. GEN. LAWS ANN. ch. 278, § 12 (West, 1972) provides that the defendant may be convicted of the "residue" of a felony charged.

See, e.g., Commonwealth v. *Santo,* 376 N.E.2d 866 (Mass. 1978).

MICHIGAN

MICH. COMP. LAWS § 768.32 (Supp. 1979) provides that the defendant may be found guilty of attempt or a lesser degree of the offense charged except in the case of major controlled substances offenses identified by Mich. Comp. Laws § 335.341). [Section 335.341 has since been repealed, Mich. 1978 P.A. No. 368, § 25101, and has been replaced by new § 333.7403-.7404. (1978 Mich. Legis. Serv. (West).)]

MICH. COMP. LAWS § 768.29 (1968) provides that the court "shall instruct . . . as to the law applicable to the case," but failure so to instruct is not a ground for setting aside the judgment unless the defendant requested the instruction).

See, e.g., People v. *Drielick,* 56 Mich. App. 664, 224 N.W.2d 712 (1974), *aff'd,* 400 Mich. 559, 255 N.W.2d 619 (1977), *cert. denied,* 434 U.S. 1047 (1978).

MINNESOTA

MINN. STAT. ANN. § 609.04(1) (West Supp. 1979) provides that the defendant may be convicted of an included offense.

MINN. R. CR. P., Rule 26.03, subd. 18(5), MINN. RULES OF COURT (West, 1979) provides that instructions "shall state all matters of law which are necessary for the jury's information in rendering a verdict. . . .")

See, e.g., State v. *Merrill,* 274 N.W.2d 99 (Minn. 1978).

MISSISSIPPI

MISS. CODE ANN. § 99-19-5 (1972) provides that the jury

may find defendant guilty of a lesser included offense.

MISS. CODE ANN. § 99-17-20 (1972) provides that when the offense charged is punishable by death, the judge "may grant an instruction . . . as to [the jury's] discretion to convict the accused of the commission of an offense not specifically set forth in the indictment. . . ."

See, e.g., Jackson v. *State,* 337 So.2d 1242 (Miss. 1976).

MISSOURI

MO. ANN. STAT. § 556.046(1) (Vernon Spec. Pamphlet 1978) provides that the defendant may be convicted of a lesser included offense.

MO. ANN. STAT. § 556.046(2) (Vernon Spec. Pamphlet 1978) provides that the court is not obligated to instruct on included offenses "unless there is a basis for a verdict" convicting of only the lesser offense).

MO. ANN. STAT. § 565.006(1) (1979 Mo. Legis. Serv. (Vernon)) provides: "In each jury capital murder case, the court shall not give instructions on any lesser included offense which could not be supported by the evidence presented in the case."

See, e.g., State v. *Stone,* 571 S.W.2d 486 (Mo. App. 1978).

MONTANA

MONT. REV. CODES ANN. § 95-1915(3) (Supp. 1977) ("defendant may be found guilty of an offense necessarily included in the offense charged. . . .") *Accord,* MO. SUP. CT. R., Rule 27.01(c), MO. RULES OF COURT (West, 1979).

See, e.g., State v. *Ostwald,* 591 P.2d 646 (Mont. 1979).

NEBRASKA

NEB. REV. STAT. § 29-2025 (1975) provides for the conviction of lesser degrees of an offense than the degree charged, and for the conviction oa an attempt to commit an offense when the defenant is found not guilty of the offense but the attempt is an offense.

See, e.g., State v. *Hegwood,* 202 Neb. 379, 275 N.W.2d 605 (1979).

NEVADA

NEV. REV. STAT. § 175.501 (1977) provides that:

"The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

See, e.g., Larsen v. *State,* 93 Nev. 397, 566 P.2d 413 (1977).

NEW HAMPSHIRE

New Hampshire has neither a statute nor a rule on lesser included offenses. Its common law does permit instructions and convictions on lesser included offenses of the offense charged, if the evidence would justify a finding of guilt of the lesser offense.

See, e.g., State v. *Boone,* No. 78-274 (N.H. Aug. 17, 1979).

NEW JERSEY

N.J. STAT. ANN. § 2C:1-8(d) (West, 1979) provides that "A defendant may be convicted of an offense included in an offense charged whether or not the included offense is an indictable offense." Section 2C:1-8(e) permits the court to charge the jury with respect to the included offense only if there is "a rational basis for a verdict convicting the defendant of the included offense."

See, e.g., State v. *Saulnier,* 63 N.J. 199, 306 A.2d 67 (1973).

NEW MEXICO

N.M. R. CR. P., Rule 44(d), N.M. STAT. ANN. § 41-23-44 (Supp. 1975) provides as follows:

"If so instructed, the jury may find the defendant guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.")

See, e.g., State v. *Aubrey,* 91 N.M. 1, 569 P.2d 411 (1977).

NEW YORK

N.Y. CRIM. PROC. LAW § 300.50(1) (McKinney, 1971) provides that the court may submit to the jury, in addition to the greatest offense which it is required to submit, any lesser included offense "if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater. If there is no reasonable view of the evidence which would support such a finding, the court may not submit such lesser offense." Section 300.50(2) provides that a failure to submit such a lesser included offense charge to the jury when the evidence would support it is not error if neither party requests such a charge.

See, e.g., People v. *Henderson,* 41 N.Y.2d 233, 391, N.Y.S.2d 563, 359 N.E.2d 1357 (1976).

NORTH CAROLINA

N.C. GEN. STAT. § 15-169 (1978) provides that in a trial for rape or any felony where the crime includes an assault, the defendant can be acquitted of the felony and convicted of the assault if the evidence warrants such a finding.

N.C. GEN. STAT. § 15-170 (1978) provides for the conviction of the crime charged in the indictment or of a lesser degree of the same crime or of attempt to commit that crime.

See, e.g., State v. *Drumgold,* 297 N.C. 267, 254 S.E.2d 531 (1979).

NORTH DAKOTA

N.D. R. CR. P., Rule 31(c), N.D. CENT. CODE (1974) provides that "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

See, e.g., State v. *Piper,* 261 N.W.2d 650 (N.D. 1977).

OHIO

OHIO REV. CODE ANN. § 2945.74 (Baldwin, 1971) provides

that the jury can find the defendant guilty of attempts to commit the crime charged, or of lesser degrees, or of lesser included offenses of the crime charged.

See, e.g., State v. *Kilby,* 50 Ohio St.2d 21, 361 N.E.2d 1336 (1977).

OKLAHOMA

OKLA. STAT. ANN. tit. 22, § 916 (West, 1958) provides that "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

See, e.g., Gilbreath v. *State,* 555 P.2d 69 (Okla. Crim. App. 1976).

OREGON

OR. REV. STAT. § 136.460 (1977) provides for the conviction of a lesser degree of the crime charged or of an attempt to commit a lesser degree of the crime charged. Section 136.465 provides for the conviction of lesser included offenses of the crime charged.

See, e.g., State v. *Thayer,* 32 Or. App. 193, 573 P.2d 758 (Ct. App. 1978).

PENNSYLVANIA

Pennsylvania does not have a statute providing for instructions on lesser included offenses; its Rules of Criminal Procedure indirectly refer to lesser included offenses in Rules 1120(d) and 1120(e) (PA. STAT. ANN. (Purdon, 1979)). Rule 1120(d) provides that when a jury agrees on certain counts in the indictment which operate as an acquittal of lesser or greater included offenses to which they cannot agree, the lesser or greater included offenses shall be dismissed. Rule 1120(d) provides similarly.

See, e.g., Commonwealth v. *Terrell,* 482 Pa. 303, 393 A.2d 1117 (1978).

PUERTO RICO

P.R. R. CR. P., Rule 147, P.R. LAWS ANN. tit. 34 (1971)

provides that:

> "The defendant may be found guilty of any lesser offense the commission of which is necessarily included in that with which he is charged; or of a lesser offense than that with which he is charged; or of an attempt to commit either the offense charged or any offense the commission of which is necessarily included therein, or any degree thereof, if the attempt constitutes in itself, an offense."

RHODE ISLAND

R.I. GEN. LAWS § 12-17-14 (Supp. 1978) provides that the jury can find defendant guilty of a lower offense or of an attempt to commit the offense charged if it is not satisfied that defendant is guilty of the whole offense.

R.I. SUP. CT. R. P., Rule 31(c), and R.I. DIST. CT. R. P., Rule 31, R.I. GEN. LAWS (1976) both provide that a defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included in the offense charged.

See, e.g., State v. *Walsh,* 113 R.I. 118, A.2d 463 (1974).

SOUTH CAROLINA

South Carolina has neither a statute nor a rule of criminal procedure concerning lesser included offenses. Its common law permits an instruction on a lesser offense when there is evidence showing that the defendant was only guilty of the lesser offense.

See, e.g., State v. *Shea,* 226 S.C. 501, 85 S.E.2d 858 (1955); *State* v. *Mickle,* ____ S.C. ____, 254 S.E.2d 295 (1979).

SOUTH DAKOTA

S.D. CODIFIED LAWS ANN. § 23A-26-8 (Supp. 1978) (Rule 31(c), Rules of Criminal Procedure) provides that a defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit the offense charged or a necessarily included offense.

See, e.g., State v. *Grimes,* 237 N.W.2d 900 (S.D. 1976).

TENNESSEE

TENN. CODE ANN. § 40-2518 (1979) requires the judge without request to charge the jury as to the law of each offense included in the indictment in any prosecution for a felony where two or more grades or classes of offense may be included in the indictment.

TENN. R. CR. P., Rule 31(c), TENN. CODE ANN. (1979) provides that a defendant may be found guilty of an offense necessarily included in the offense charged, or of an attempt to commit the offense charged or a necessarily included offense.

See, e.g., Howard v. *State,* 578 S.W.2d 83 (Tenn. 1979).

TEXAS

TEX. CRIM. PRO. CODE ANN. Art. 37.08 (Vernon Cum. Supp. 1978) provides that the jury may find the defendant not guilty of a greater offense but guilty of any lesser included offense in a prosecution for an offense with lesser included offenses. Article 37.09 defines lesser included offenses.

See, e.g., Day v. *State,* 532 S.W.2d 302 (Tex. Crim. App. 1976).

UTAH

UTAH CODE ANN. § 76-1-402(3) (1978) provides that a defendant may be convicted of an offense included in the offense charged. Section 76-1-402(4) provides that the court is not obligated to charge the included offense "unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."

UTAH CODE ANN. § 77-33-6 (1953) provides: "The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense."

See, e.g., State v. *Gillian,* 23 Utah 2d, 372, 463 p. 2d 811 (1970).

VERMONT

VT. R. CR. P., Rule 31(c), VT. STAT. ANN. (1974) provides for the conviction of offenses which are necessarily included in the offense charged, or conviction of attempts to commit the offense charged or an included offense.

See, e.g., State v. *Nicasio,* 136 Vt. 162, 385 A.2d 1096 (1978).

VIRGINIA

VA.CODE § 18.2-54 (1975) provides that:

> "On any indictment for maliciously shooting, stabbing, cutting or wounding a person or by any means causing him bodily injury, with intent to maim, disfigure, disable or kill him or of causing bodily injury by means of any acid, lye or other caustic substance or agent, the jury or the court trying the case without a jury may find the accused not guilty of the offense charged but guilty of unlawfully doing such act with the intent aforesaid, or of assault and battery if the evidence warrants."

VA. CODE § 19.2-285 (1975) provides that if a defendant is acquitted by the jury of part of the offense charged he can be sentenced for whatever part he is convicted of. § 19.2-286 provides that a defendant may be found not guilty of the felony charged but convicted of an attempt to commit that felony.

See, e.g., Painter v. *Commonwealth,* 210 Va. 360, 171 S.E.2d 166 (1969).

WASHINGTON

WASH. REV. CODE § 10.61.010 (1961) provides for the conviction of a lesser degree of the crime charged or of an attempt to commit the crime charged or an attempt to commit a lesser degree of the crime charged. Section 10.61.003 provides similarly. Section 10.61.006 provides that a defendant may be found guilty of an offense which is necessarily included within that with which he is charged.

See, e.g., State v. *Workman,* 90 Wash. 2d 443, 584 P.2d 382 (1978).

WEST VIRGINIA

W.VA. CODE § 62-3-15 (1977) provides that when a person is indicted for murder, the jury must decide whether he is guilty of first-degree or second-degree murder. Section 62-3-16 provides that:

> "On an indictment for felonious homicide, the jury may find the accused not guilty of a felony, but guilty of involuntary manslaughter. And on any indictment for maliciously shooting, stabbing, cutting, or wounding a person, or by any means causing him bodily injury, with intent to kill him, the jury may find the accused not guilty of the offense charged, but guilty of maliciously doing such act with intent to maim, disfigure, or disable, or of unlawfully doing it, with intent to maim, disfigure, disable, or kill, such person."

Section 62-3-18 provides that on an indictment for a felony, the jury may find the defendant not guilty of a felony, but guilty of an attempt to commit that felony.

See, e.g., State v. *Wayne,* _____ W. Va. _____ , 245 S.E.2d 838 (1978).

WISCONSIN

WIS. STAT. ANN. § 939.66 (West, 1958) provides for the conviction of either the crime charged or an included crime, but not both. Attempts are defined as included crimes.

See, e.g., Leach v. *State,* 83 Wis.2d 199, 265 N.W.2d 495 (1978).

WYOMING

WYO. CT. R., Rule 32(c), WYO. STAT. ANN. (1979) provides that the defendant may be found guilty of a necessarily included lesser offense or of an attempt to commit the offense charged or the lesser included offense.

See, e.g., Jones v. *State,* 580 P.2d 1150 (Wyo. 1978).

APPENDIX C

STATE DEATH PENALTY STATUTES

1. Code of Alabama, Title 13A, § 13A-5-31 *et seq.* (1977).
2. Arizona Revised Statutes, Title 13, § 13-902 (1973), as amended 1978.
3. Arkansas Statutes Annotated, Criminal Code, Chapter 13, § 41-1301 *et seq.* (1975), as amended 1977.
4. California Penal Code, Title 18 § 190.1 *et seq.* (1978).
5. Colorado Revised Statutes, Title 16, § 16-11-103 (1975).
6. General Statutes of Connecticut, Title 53a, § 53a-45 (1969), as amended 1973.
7. Delaware Code Annotated, Title 11, § 4209 (1953), as amended 1977.
8. Florida Statutes Annotated, Title 45 § 921.141 (1972), as amended 1978.
9. Code of Georgia Annotated, Title 27, § 27-2534.1 (1973).
10. General Laws of Idaho Annotated, Title 18, 18 § 4004 (1973), as amended 1977.
11. Illinois Revised Statutes, Chapter 38, § 9-1, (1961), as amended 1979.
12. Indiana Statutes Annotated, Title 35, §§ 35-50-2-3; 35-50-2-9 (1976), as amended 1977.
13. Kentucky Revised Statutes Annotated, Chapters 507.020 (1974), as amended 1976; 532.025 (1976).
14. Louisiana Revised Statutes Annotated, Code of Criminal Procedure, Article 905 *et seq.* (1976).
15. Annotated Code of Maryland, Article 27 § 413 (1951), as amended 1979.
16. Mississippi Code Annotated, Title 97, § 97-3-21 (1974), as amended 1977; Title 99, §§ 99-19-101 *et seq.* (1977).

17. Annotated Missouri Statutes, Title 38 §§ 565.008; 565.012 (1977).
18. Revised Code of Montana, Title 95, §§ 95-2206.6; 95-2206.7; 95-2206.8 (1977).
19. Revised Statutes of Nebraska, Article 25, §§ 29-2521; 29-2522; 29-2523 (1973).
20. Nevada Revised Statutes, Title 16, § 200.030 (1911), as amended 1977; §§ 200.033; 200.035 (1977).
21. New Hampshire Revised Statutes Annotated, Criminal Code, Chapter 630 (1971), as amended 1977.
22. New Mexico Statutes Annotated § 31-18-14 (1978).
23. New York Penal Law, § 60.06; 125.27(1)(a)(iii) only (1974). *See, People v. Davis* 43 N.Y. 2d 17 (1977).
24. General Statutes of North Carolina, Chapter 15, § 15A-2000 (1977).
25. Oklahoma Statutes Annotated, Title 21, § 701.9 *et seq.* (1976).
26. Oregon Revised Statutes, Chapter 163, § 163.003-163.145 (1978).
27. Pennsylvania Consolidated Statutes Annotated, Title 18 § 1311 (1972), as amended (1978).
28. Code of Laws of South Carolina, Title 16, § 16-3-20 (1977).
29. South Dakota Codified Laws, Chapter 22, § 22-6-1 (1877), as amended (1979); Chapter 23A, § 23A-27-1 (1877), as amended 1978.
30. Tennessee Code Annotated, Title 39, § 39-2402; 39-2404 (1858), as amended 1977.
31. Texas Code of Criminal Procedure, Chapter 37, § 37.071 (1973).
32. Utah Code Annotated, Title 76, § 76-3-207; 76-5-202 (1973), as amended 1975.

33. Revised Code of Washington Annotated, Title 9A, Article 1 (1977).
34. Wyoming Statutes Annotated, Title 6, §§ 6-4-101; 6-4-102; 6-4-103 (1977).

Supreme Court, U. S.
FILED
JAN 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 78-6621

GILBERT FRANKLIN BECK,

Petitioner,

v.

STATE OF ALABAMA,

Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF OF RESPONDENT

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February 7, 1980

Honorable Michael Rodak, Jr.
Clerk
United States Supreme Court
Washington, D.C. 20543

Re: Gilbert Franklin Beck v.
Alabama (No. 78-6621)

Dear Mr. Rodak:

Upon reading petitioner's reply brief yesterday, I was embarrassed to discover that I had misquoted a passage out of one of the Court's opinions. The passage, from Woodson v. North Carolina, 428 U.S. 280, 303 (1976), is as follows:

> it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict. (Emphasis added.)

As petitioner correctly points out in footnote 1 of his reply brief, the three words to which emphasis is added were omitted from the quotation of that passage which is contained on page 21 of the brief which I submitted for respondent.

The omission was unintentional, but it is inexcusable that I would have been so careless as to have permitted it to occur. I want to apologize to the Court and to opposing counsel for this error, an error for which I accept full

responsibility. I regret very much that it happened.

Enclosed are extra copies of this letter. If possible, I would appreciate it if you would forward a copy to each member of the Court as my apology.

Respectfully yours,

Ed Carnes

EDWARD E. CARNES
Assistant Alabama Attorney
General

EEC:sa
Enclosures

cc: Honorable David Klingsberg
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IN THE

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October Term, 1979

No. 78-6621

GILBERT FRANKLIN BECK,

Petitioner

v.

STATE OF ALABAMA,

Respondent

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Pre-Trial Events

Roy Frank Malone, a retired veterinarian, and Dora Mae Ford, his elderly housekeeper, were robbed and murdered at Malone's home in a rural section of Etowah County, Alabama, on November 8, 1976. That same day,

petitioner was arrested (R. 277-279, 304-305). The next morning, after having been fully advised of his Miranda rights (R. 294-295), and after signing a written waiver of those rights (R. 300-301; S. Ex. 7, R. 315, 317, 1112), petitioner dictated and signed a statement admitting participation in the crime (R. 318-319; S. Ex. 8, R. 337, 1113-1116, A. 22-24). Petitioner did not seriously contest the voluntariness of this statement at trial and his counsel admitted to the court, "if your Honor finds it voluntary I cannot take any real issue . . ." (R. 321). Nor did petitioner raise before the appellate courts below any issue concerning the admissibility or voluntariness of the statement.

Petitioner's statement is contained on R. 1113-1116, and it is reprinted in its entirety in the opinion of the Alabama Court of Criminal Appeals (A. 22-24). In the statement, petitioner admitted that he and Roy Frank Clements had robbed Mr. Malone and Ms. Ford, but denied that he had actually killed them himself (A. 22-23). A relevant portion of his statement is as follows:

> "We got down there the second time & as we drove up in the driveway Mr. Malone came to the door & asked us to come inside, we stayed in the house & talked for a few minutes & Roy had gone to the bathroom, as he was coming back from the bathroom I grabbed Mr. Malone & he went down on his knees & hollered for Aunt Mae to get the gun. Roy then grabbed Aunt Mae & hit her in the head with a Rachet wrench that he had taken out of my truck, at least four times. I did not do any of the cutting but I did hold Mr. Malone down. After Roy knocked Aunt Mae down he then drug her into the living room & then came to where I was holding Mr. Malone down, if there was anyone cut it had to be Roy that did the cutting. Roy then grabbed the billfold & purse & we ran for the truck, I was the one that was doing the driving . . ." (A. 22-23).

Petitioner admitted in his statement that the $73.00 taken during the robbery was split up afterwards (A. 23). Petitioner also admitted that he burned the clothes he had worn during the crime and that he threw the victims' billfold and purse over the side of a mountain (A. 23).[1]

Petitioner was indicted for the first degree murder of Roy Malone during the course of robbing him (R. 821, A. 17-18). That crime is a capital offense under the provisions of *Code of Alabama* 1975, §13-11-2(a)(2)[2]. He was also charged in a separate indictment for the same offense wherein Dora Mae Ford was the victim (R. 100), but that

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[1]Roy Clements, the other participant in the crime, also gave a statement after his arrest, and his statement is reproduced in *Clements v. State*, 370 So.2d 708, 718-721 (Ala. Cr. App. 1978), *rev'd on state law grounds*, 370 So.2d 723 (Ala. 1979). Clements testified in his own behalf at his trial for the capital felony of murdering Dora Mae Ford during the course of robbing her, and that testimony is summarized in *Clements v. State*, 370 So.2d at 711-712. In his statement and in his trial testimony, Clements insisted that petitioner, who was 12 years older than he, 370 So.2d at 718, A. 22, had instigated the robbery and had actually killed both Roy Malone and Dora Mae Ford. Clements insisted that after petitioner surprised him by cutting Mr. Malone's throat, Clements ran outside and petitioner came out later with the victims' purse and billfold. 370 So. 2d at 711-712, 719-720.

[2]Section 3-11-2(a)(2), which defines the capital offense, does not require that the robbery victim be murdered in the first degree but simply that the victim be intentionally killed. However, the indictment against petitioner gratuitously averred that the intentional killing of Malone was committed "with malice aforethought," and those three words constitute an averment of first degree murder under Alabama law. *See, Code of Alabama* 1975, §15-8-150(72). The Alabama Supreme Court has held that while such an additional averment in a capital case is not required, it is permissible, but if the state avers that the robbery victim was murdered in the first degree instead of simply intentionally killed, then the state must prove murder in the first degree. *E.g., Clements v. State*, 370 So.2d 723, 725 (Ala. 1979); *Jacobs (John L.) v. State*, 371 So.2d 448, 449 (Ala. 1979).

indictment has not been brought to trial.[3]

The Evidence at Trial

At petitioner's trial, it was undisputed that Roy Malone had been killed by having his throat stabbed or cut (R. 228-229), and petitioner admitted that the killing took place while petitioner and Roy Clements were robbing Mr. Malone (R. 212-213, A. 57, 60-61). However, petitioner claimed that he "drew no blood from anybody on that occasion," that he had not anticipated that anyone was going to be killed, and that Roy Clements had actually done the killing (R. 213, A. 56-58).

Mary Ann Thrasher, the woman with whom petitioner was living at the time of the crime (R. 383-384, 411), was a witness for the state. She testified that before petitioner and Roy Clements left to commit the robbery, petitioner had been sharpening his knife on a whet rock (R. 385-388). She said that she had not seen Clements with a knife (R. 434). About an hour after petitioner and Clements had left to commit the robbery, they returned and explained that three men had driven up at Mr. Malone's house (R. 388). Petitioner and Clements waited an hour and a half or two hours and then went back to Mr. Malone's house (R. 388). When Thrasher saw petitioner and Clements again approximately two and a half hours later, they had Roy Malone's billfold and Dora Mae Ford's purse (R. 389-390). Petitioner's clothing and boots had blood on them (R. 395,397). Petitioner changed clothes and then burned the

[3]Alabama law prohibits the joint trial of indictments involving different victims or crimes, and because of limited criminal justice system resources the usual practice is to pursue only one such indictment against a defendant. While petitioner was prosecuted under the capital indictment in which Roy Malone was named as the victim, Roy Clements was prosecuted under the capital indictment in which Dora Mae Ford was named as the victim. See *Clements v. State*, 370 So.2d 708 (Ala. Cr. App. 1978), *rev'd on state law grounds*, 370 So.2d 723 (Ala. 1979). The apparent reason for the difference is that while each claimed the other one did the actual killing of the victims, petitioner admitted holding Malone down and Clements admitted holding Ford. See p. 3, n. 1, *supra*.

pants, shirt, and jacket that he had been wearing (R. 392-394).

Deborah Clements is Mary Ann Thrasher's daughter and Roy Clement's wife (R. 477-478). She testified as a witness for the state. She said she had not seen petitioner sharpening a knife before the robbery, but she also said she had been in another part of the house most of the time (R. 488-490), a fact which petitioner himself admitted (R. 584). She testified that she had never known Roy Clements to carry a knife (R. 490). She also testified that after returning from the robbery, petitioner said, "We did it" or words to that effect (R. 481-482, 496-497). When they returned from the robbery, petitioner had blood on his clothing, but she didn't see any on Clements (R. 507). After petitioner burned some of his clothing, the group drove to a place halfway up a mountain where petitioner got out of the car and threw Roy Malone's billfold and Dora Mae Ford's purse off the mountainside (R. 483-484).

After petitioner was arrested, his boots were seized and later examined by a criminalist (S. Ex. 9, R. 458-460), an expert in examination of physical evidence (R. 451-453). The criminalist testified at trial that he had found human bloodstains on the left boot near the top of the toe (R. 458, 466). He also testified that there were at least six spots of blood on the boot, and that the blood was in a droplet formation and was not a smear (R. 466, 468).

The state introduced into evidence at trial petitioner's statement in which he admitted, among other things, having held Mr. Malone down during the crime (S. Ex. 8, R. 337, 1113-1116, A. 22-24).

After the state rested, petitioner presented several witnesses in an attempt to impeach the credibility of Mary Ann Thrasher (R. 543, 562, 659). However, petitioner did not dispute the truthfulness of Deborah Clements' testimony, and instead admitted, "She didn't lie about nothing. Debbie Clements told the truth about everything. I'll testify to that." (R. 584).

During his testimony, petitioner admitted that he had

jumped Mr. Malone on a prearranged signal from Roy Clements (A. 57, 59). He denied cutting or killing Mr. Malone and said that Clements had done it (A. 57-58). However, petitioner admitted that at the time he claims that Clements cut Mr. Malone's throat, petitioner had Mr. Malone down on his hands and knees and was holding him from behind (A. 57, 59-60).

Petitioner attempted to explain having to burn his clothing after the crime by claiming that during the crime he had gotten "a little bit of blood, just a small amount on my right hand," and saying that when he slung his hand to get the blood off one drop went on his pants, one drop went on his jacket, and one drop went on his boot (R. 598-599).

Petitioner testified that he did not anticipate that Mr. Malone would be killed during the robbery (A. 56). However, petitioner did not explain how he had planned to get away with robbing someone who not only could identify him but also knew who he was. Petitioner did not deny that Mr. Malone knew him. Indeed, petitioner admitted as much. Petitioner testified that Clements and he had been unable to rob Mr. Malone on their earlier trip that day because three men who Mr. Malone knew drove up in the driveway (R. 585-586). Petitioner testified that Mr. Malone introduced the three men to him (R. 586).[4]

The Jury Instructions

The trial court instructed the jury that petitioner was charged with the capital offense of murdering Roy Malone in the first degree during the course of robbing him (A. 3, 8, 14). It explained the elements of robbery (A. 7-8) and the elements of first degree murder (A. 8). Pursuant to *Code of Alabama* 1975, §13-11-2(a), the jury was not permitted to convict on any lesser included offenses (A. 9).

The court instructed the jury on the presumption of

[4]In making its sentencing determination, the trial court specifically found as an aggravating circumstance that the capital felony was committed for the purpose of avoiding or preventing an arrest because the two eyewitness victims were killed (A. 34). But see p. 10, n. 9, *infra*.

innocence (A. 4), and it repeatedly instructed the jury that the jury could not convict the petitioner unless convinced beyond a reasonable doubt of the existence of all the elements of the capital offense (A. 4-5, 7-8, 10-11, 13-14). The court made it clear to the jury that before there could be a conviction, the jury had to be not only convinced beyond a reasonable doubt that petitioner had committed a robbery but in addition thereto it had to be convinced beyond a reasonable doubt that petitioner was also guilty of first degree murder:

> "The Court charges the jury that you cannot convict the Defendant under this indictment if you believe beyond a reasonable doubt and to a moral certainty that Defendant is guilty of robbery and if you do not believe beyond a reasonable doubt and to a moral certainty that Defendant is guilty of the offense of murder in the First Degree as charged in the indictment.
>
> The Court charges the jury that you cannot convict the Defendant if you believe from the evidence Defendant is guilty of the offense of Murder in the First Degree as charged in the indictment, if you do not believe beyond a reasonable doubt and to a moral certainty the Defendant is guilty of the offense of[5] robbery as charged in the indictment.
>
> The Court charges you that you cannot convict the Defendant if you are not convinced beyond a reasonable doubt and to a moral certainty that Defendant is guilty of robbery as charged in the indictment and Murder in the First Degree as charged in the indictment.
>
> The Court charges the jury, if you are not convinced beyond a reasonable doubt that Defendant robbed Roy Malone as charged in the indictment and murdered Roy Malone as charged in the indictment and you are

[5]This word is printed as "or" in the appendix (A. 14), but the record shows that the court said "of" (R. 753).

not convinced beyond a reasonable doubt on the fixing of death you cannot convict the Defendant and fix his punishment at death.

The Court charges the jury that you must be convinced beyond a reasonable doubt and to a moral certainty that Defendant did commit the offense of robbery against the person of Roy Malone as alleged in the indictment, and you must be convinced beyond a reasonable doubt and to a moral certainty that the Defendant did commit the offense of Murder in the First Degree against the person of Roy Malone as charged—as alleged in the indictment before you can return a verdict of guilty." (R. 753-754, A. 13-14)

The trial court's instructions meant that before the jury could convict petitioner of the capital offense it had to find that petitioner had committed the "willful, deliberate, malicious and premeditated killing" of Roy Malone (A. 8). As the court explained to the jury, "willfullness as an ingredient of murder in the first degree, means governed by the will without yielding to reason — It means intention" (A. 8). The court further defined the requisite intent as follows:

"Intent expresses mental action at its most advanced point or as it actually accompanies an outward corporal act which has been determined on. Intent shows the presence of will, and that the act which consumates a crime. It is the exercise of intelligent will, the mind being fully aware of the nature and consequence of the act which is about to be done, and with such knowledge and with full liberation of action willing and electing to do it." (A. 8-9)

The court did instruct the jury on the law of aiding and abetting and on the law making one conspirator in a criminal activity responsible for consequent acts growing out of the conspiracy, but it added:

"While the parties are responsible for consequent acts growing out of the general design they are not

responsible for independent acts growing out of particular acts of individuals." (A. 6)

In view of the instructions on intent which the court gave elsewhere in its charge, the jury could not have convicted petitioner of the capital offense unless it was convinced beyond a reasonable doubt that petitioner was at least an accomplice to the intentional killing of the victim.[6] In any event, petitioner did not raise any issue concerning the conspiracy or aiding and abetting aspects of the court's charge in his appeal to the Alabama appellate courts.

While the jury was not permitted to consider convicting the petitioner for any lesser included offense, the jury did have available an option other than convicting petitioner of the capital offense or acquitting him. The court instructed the jury that if it failed to agree on a verdict a mistrial would be entered (A. 9), and at the request of the petitioner's counsel further instructed the jury:

"The Court charges the jury that in the event that all of your number cannot agree upon a verdict, that judgment of mistrial must be entered by the Court and that Defendant may be tried again for the aggravated offense or may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance." (A. 13)

In a similar vein, petitioner's counsel told the jury during closing argument that if petitioner had an opportunity under a mistrial and re-indictment to plead to guilty to robbery or murder and get a life sentence he would do it (A.

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[6]In *Ritter v. State*, 375 So.2d 270, 274-275 (Ala. 1979), the Alabama Supreme Court construed the capital punishment statute to permit an accomplice to be convicted of the capital offense, if he was actually " an accomplice to the intentional killing" itself. See p. 62, *infra*. It also addressed the issue reserved by the plurality in *Lockett v. Ohio*, 438 U.S. 586, 609, n. 16 (1978), of whether the death penalty was a constitutionally disproportionate sentence for an accomplice, and held that under the facts in *Ritter* the death penalty was constitutionally permissible. 375 So.2d at 275. In this case, the facts do not clearly present that issue, petitioner did not raise it in the trial court or in the appellate courts below, and it is outside the scope of the order granting certiorari.

62).[7]

The Verdict and the Sentence

After deliberating one hour and thirty minutes (R. 757), the jury convicted the defendant as charged (R. 758). Following the jury's verdict, the court scheduled a sentence hearing to aid the court in determining whether to sentence petitioner to death or life imprisonment without parole.[8] At that hearing, both the state and the petitioner presented witnesses and argument on the question of whether petitioner should be sentenced to death or life imprisonment without parole (R. 762-812). Thereafter, based upon the evidence he had heard at trial and at the sentence hearing and after considering the arguments of the parties, the trial court entered findings of aggravating and mitigating circumstances, and then sentenced petitioner to death (R. 812-813, A. 34).[9]

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[7]Section 13-11-2(c) provides that if a mistrial is entered the defendant may be tried again for the capital offense (an "aggravated offense") or may be re-indicted for a non-capital offense (an "offense wherein the indictment does not allege an aggravated circumstance").

[8]Under section 13-11-2(a), the jury verdict form convicting a defendant must "fix the punishment at death," but the trial court judge, not the jury, is the sentencing authority. See pp.25-26, *infra*.

[9]In determining sentence, the trial court found and considered four aggravating circumstances (R. 812-813). Although petitioner did not raise in the Alabama appellate courts any issue concerning those findings, Alabama Supreme Court decisions rendered after petitioner was sentenced establish that two of them were erroneous as a matter of state law.

One of these was the trial court's finding that the capital felony was committed for pecuniary gain within the meaning of section 13-11-6(6) (R. 812). *Cook v. State*, 369 So.2d 1251 (Ala. 1979), held that that particular aggravating circumstance could not be found and considered when the capital felony was murder during the course of robbery, as in the present case. The second aggravating circumstance finding shown to be erroneous by a subsequent decision is the trial court's finding that since the two eyewitness victims were killed the capital felony was committed for the purpose of avoiding or preventing a lawful arrest within the meaning of section 13-11-6(5) (R. 812-813). In the recent case of *Anthony O'Hara Johnson v. State*, No. 78-670, (Ala. Dec. 7, 1979), the

[footnote continued on next page]

The State Court Appeals

On appeal to the Alabama Court of Criminal Appeals petitioner raised several federal issues including one involving the constitutionality of precluding lesser included offenses, his arguments were rejected, and his conviction and sentence were affirmed. *Beck v. State*, 365 So.2d 985, 999-1003 (Ala. Cr. App. 1978). On appeal to the Alabama Supreme Court petitioner only raised a state law issue and did not ask the court to review the Court of Criminal Appeals holdings in regard to any federal issue. *Beck v. Alabama*, 365 So.2d 1006, 1007 (Ala. 1978). Noting that the petitioner did not ask it to review anything but the Court of Criminal Appeals' holding on the state law issue, the Alabama Supreme Court affirmed that court's decision affirming petitioner's conviction and sentence. *Id.*

[footnote continued from preceding page]

Alabama Supreme Court held that that aggravating circumstance applied only when the persons killed were attempting to make a lawful arrest or prevent an escape, and that it cannot be found to exist merely because victim witnesses were killed.

Accordingly, if this Court affirms petitioner's conviction, when the case returns to the Alabama appellate courts a new sentence determination will have to be ordered. Even though the trial court's findings concerning two other aggravating circumstances (R. 812-813) are correct, a new sentence determination by the trial court will still be necessary. *E.g., Cook v. State, supra; Anthony O'Hara Johnson v. State, supra.*

SUMMARY OF ARGUMENT

The preclusion of lesser included non-capital offenses by Alabama's capital punishment statute serves to promote rational and consistent sentencing in capital cases by removing an historically proven source of de facto discretion. While the risk or level of arbitrariness and capriciousness in capital sentencing can be reduced to a constitutionally tolerable amount without preclusion, the reduction of it even further than the Constitution requires is a legitimate state purpose. Preclusion is especially important under Alabama's statute because the state has chosen to pursue the advantages of judicial sentencing to the utmost and thereby maximize rationality and consistency in sentencing while at the same time seeking to ensure the reliability of fact-finding by requiring that juries make specific reference to the penalty of death in any verdict convicting a defendant of a capital offense.

Preclusion does not undermine the proof beyond a reasonable doubt standard or jeopardize the reliability of fact-finding in cases tried under Alabama's statute. Petitioner's assumption that juries cannot be trusted to follow their instructions and acquit capital defendants who are only guilty of non-capital offenses but instead will disobey their oaths and instructions and wrongfully convict defendants of capital offenses for which they are not guilty is not proven by statistics showing a high conviction rate under Alabama's statute. The lesser included offense doctrine originated to protect prosecutors from suffering acquittals when they fail to prove some element of the higher offense charged, *Keeble v. United States*, 412 U.S. 205, 208 (1973), and the conviction statistics reflect that prosecutors have responded to the non-availability of that protection by prosecuting only the strongest capital cases as capital cases.

Petitioner's speculative assumption that preclusion will cause juries to act lawlessly and wrongfully convict defendants of capital offenses should be rejected for three

reasons. First, it casts doubt upon the basic integrity of our jury system which is premised upon juries following their instructions. Second, it is contradicted by the historical evidence which shows that juries have always been more cautious, more compassionate, and far more reluctant to convict in capital cases than in non-capital cases. Juries are meticulous in their regard for the rights of capital defendants, and if they do disobey their oaths and instructions it is to favor those defendants. This historical evidence has been cited and the predictability of juries' different behavior in capital cases relied upon in cases such as *Woodson v. North Carolina*, 428 U.S. 280, 289-296, 302-303 (1976) (plurality opinion). *Accord, Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring); *id.* at 388, 402 (Burger, C.J., dissenting); *see e.g., Witherspoon v. Illinois*, 391 U.S. 510, 519-520 (1968) (juries "express the conscience of the community"); *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (joint opinion) (juries reliably reflect society's values and evolving standards of decency).

The third reason petitioner's speculative assumption should be rejected is that it ignores safeguards built into Alabama's statute to ensure that a defendant is not wrongfully convicted of a capital offense. The first is the requirement that any verdict convicting a defendant of a capital offense "fix the penalty at death," even though the jury is not the sentencing authority. This requirement ensures that the awesome nature of the jury's task in deciding guilt and the terrible responsibility it assumes in convicting a defendant of a capital offense will be impressed upon each juror. It thereby serves to reinforce the proof beyond a reasonable doubt standard by calling upon the historical reluctance of jurors to convict in cases in which death is the result. The second statutory safeguard is the mistrial and re-indictment clause which provides that if the jury is unable to agree on a verdict of guilty or not guilty or on the fixing of the penalty at death in the verdict a mistrial is declared and the defendant can thereafter be re-indicted for a non-capital offense. The

availability of the mistrial option and the possibility of re-indictment means that the jury is not forced to choose between acquitting a defendant who is guilty of a serious non-capital offense and wrongfully convicting him of a capital offense for which he is not guilty. In this case, the jury was specifically instructed about its mistrial option and the re-indictment possibility. The third statutory safeguard is the sentencing function performed by the trial judge who weighs aggravating and mitigating circumstances in deciding the sentence of a convicted capital defendant. The trial judge is not bound by any fact-finding implicit in a guilty verdict, and can consider as a non-statutory mitigating circumstance the quantum of evidence. The reliability of sentencing decisions is further safeguarded by appellate review.

Keeble v. United States, 412 U.S. 205 (1973), was decided on the basis of statutory interpretation and did not hold that preclusion of lesser included offenses violated due process. The only constitutional holding in *Keeble* was the implicit holding of the dissent that preclusion was constitutionally permissible. The observations of the *Keeble* majority about the possibility that preclusion might cause a jury to convict a defendant of a higher offense than he was guilty of are not applicable to cases tried under Alabama's capital punishment statute because juries behave predictably different in capital cases, and because Alabama's statute has special safeguards that reinforce the reasonable doubt requirement and further ensure the reliability of fact-finding. Contrary to petitioner's assertions, dictum in a footnote contained in the joint opinion in *Gregg v. Georgia*, 438 U.S. 153, 199 n. 50 (1976), does not state the preclusion is alien to our system of criminal justice and unconstitutional.

The fact that lesser included offenses have historically been available and that Alabama is the only jurisdiction which precludes lesser included non-capital offenses does not mean that preclusion is unconstitutional. *Johnson v. Louisiana*, 406 U.S. 356 (1972), held that due process did

not require jury unanimity despite the fact that the unanimous jury, which originated as early as the 14th century is embedded in our legal history, and upheld Louisiana's 9 to 3 rule even though no other state had one like it. *Williams v. Florida*, 399 U.S. 78 (1970), held that states were not required to use twelve-member juries even though that had been the fixed number for five hundred years, even though earlier decisions had assumed that number was constitutionally required, and even though the federal courts and virtually all the states used that number. In accord with these principles is *Leland v. Oregon*, 343 U.S. 790 (1972), the continuing validity of which was noted in *Patterson v. New York*, 432 U.S. 197, 204-205 (1977).

Petitioner's claim that the preclusion of lesser included offenses in capital cases but not in non-capital cases violates the Equal Protection Clause is not properly before this Court, because he did not raise that issue in the trial court or in the state appellate courts. *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974); *Street v. New York*, 394 U.S. 576, 581-582 (1969). Alternatively, that claim should be rejected because the distinction is rationally related to the purpose of preclusion since the availability of lesser included offenses in non-capital cases does not threaten the consistency of capital sentencing. The strict scrutiny test should not be applied because preclusion does not infringe upon a fundamental right, which is a right "explicitly or implicitly guaranteed by the Constitution." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 33-34 (1973). The availability of lesser included offenses is not a right guaranteed either explicitly or implicitly by the Constitution, and preclusion does not infringe upon the right to proof beyond a reasonable doubt or the right to reliable fact-finding.

Preclusion does not violate the Eighth Amendment. It does not prevent individualized sentencing or undermine the reliability of the sentencing process. Under Alabama's statute, the trial judge holds a sentencing hearing to

determine the particular circumstances concerning the offense and the offender. At the hearing evidence may be presented on any matter relevant to sentencing, and the judge is free to consider non-statutory mitigating circumstances. In making the sentence findings, the judge is not bound by any fact-finding contained in the jury's verdict. The trial judge determines the sentence based upon a weighing of the aggravating and mitigating circumstances that the judge has determined to exist, and if the judge sentences a defendant to death the evidence of aggravating and mitigating circumstances is reviewed and reweighed at the appellate level.

Neither preclusion nor any other factor has caused an improperly high percentage of capital defendants to be sentenced to death in Alabama. The sentencing statistics reflect the fact that Alabama's statute has limited capital offenses to a narrowly defined group which are most deserving of the death penalty, evidence that arbitrariness and capriciousness in sentencing have been reduced accordingly, and indicate that exactly what Mr. Justice White predicted in *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (concurring opinion), should occur has occurred.

The singularity of Alabama's procedure in precluding lesser included non-capital offenses does not indicate a violation of the Eighth Amendment. The purpose of the Cruel and Unusual Punishments Clause is not to compel uniformity of trial procedure, and each capital statute upheld by this Court contains at least one unusual or unique procedure. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (joint opinion), held that no particular system of procedures was required in capital cases and that each distinct system must be examined on an individual basis.

ARGUMENT

I.

THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES DOES NOT UNDERMINE THE PROOF BEYOND A REASONABLE DOUBT STANDARD OR JEOPARDIZE THE RELIABILITY OF THE FACT-FINDING PROCESS IN A CAPITAL CASE TRIED UNDER ALABAMA'S STATUTE

Central to virtually all of the petitioner's arguments is the assumption that the preclusion of lesser included non-capital offenses in a capital case undermines the proof beyond a reasonable doubt standard and jeopardizes the reliability of the fact-finding process. Petitioner's assumption is based on speculation that if the evidence proves a defendant guilty of a non-capital offense but not of the capital offense with which he is charged, the jury might wrongfully convict the defendant of the capital crime rather than acquit him. Not only is petitioner's assumption based upon speculation, but the historical evidence of jury behavior in capital cases, this Court's reliance on that behavior in the past, and the special safeguards contained in Alabama's statute all establish that petitioner's assumption is unwarranted.

A. The Historical Evidence Concerning Jurors' Attitudes and Behavior in Capital Cases Establishes that Jurors in Such Cases are Reluctant to Convict and Do Resolve All Doubts in Favor of Capital Defendants, and this Court has Relied Upon the Predictability of that Behavior Before

As Mr. Justice Brennan noted in *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring), "Juries, of course, have always treated death cases differently . . ." Juries have always been more cautious, more compassionate, and far more reluctant to convict in capital cases than in non-capital cases. Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54

B.U.L. Rev. 32 (1974), collects nineteenth century documentation of the willingness of jurors to seize upon any doubt, however specious or irrational, as an excuse to acquit a defendant rather than convict him of an offense where the penalty is death. Representative of that documentation is the report of a committee of the New York Assembly in 1841 which urged abolition of capital punishment because:

> "The *uncertainty of conviction*, by juries, for capital offenses, has grown almost into a proverb. There can be no criminal lawyer in this State, of any extended practice or observation, by whom this remark will not be received as a truism . . . Juries are always, and will always be, powerfully swayed in their judgment, as well as in their feelings, by that horror of shedding the blood of their fellow-man, which the laws of God have planted too deeply in the hearts of all to be eradicated, however it may be weakened, by the influence of any laws of man. In the clearest cases, it is constantly seen they *will not* convict . . . It is vain to talk of the juror's oath. They *will* violate them, by what their consciences regard as only pious perjuries, under a thousand pleas of technical deficiencies or imperfections of evidence, however immaterial in their nature."[10]

Accord, *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (plurality opinion) ("At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict.")

Indeed, the great reluctance of jurors to convict in any case in which capital punishment is the penalty has served as the motivating factor behind most of the legislative developments in this area of the law. These developments

[10]J. O'Sullivan, Report in Favor of the Abolition of the Punishment of Death 72 (2d ed. 1841), as quoted in Mackey, *supra* at 33-34 (emphasis in original).

are traced in *Woodson v. North Carolina*, 428 U.S. at 289-296 (1976) (plurality opinion). In the beginning, death was the exclusive and mandatory sentence for capital offenses which were broadly defined to include a wide range of crimes. 428 U.S. at 289. Jurors reacted unfavorably to the harshness of mandatory death sentences, and refused to convict a significant number of palpably guilty defendants. 428 U.S. at 289, 293 (plurality opinion); *id.* at 311 (Rehnquist, J., dissenting); Mackey, *supra*. The States initially responded to this problem of jury nullification by limiting the classes of capital offenses, but jurors still frequently refused to convict even murderers rather than subject them to automatic death sentences. *Woodson v. North Carolina*, 428 U.S. at 290 (plurality opinion). The next legislative response was to divide murder into degrees, thereby creating lesser included offenses, with death being the punishment only for murder in the first degree. *Id.; Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 333 n. 8 (1976) (plurality opinion). After the division of murder into degrees, juries continued to find the death penalty inappropriate in a significant number of first degree murder cases and as a result returned verdicts for a lesser degree of murder even when the defendants were clearly guilty of murder in the first degree. *Woodson v. North Carolina*, 428 U.S. at 291, 293 & n. 29, 302 (plurality opinion); *McGautha v. California*, 402 U.S. 183, 199 (1971).

Finally, because of the lack of success in attempting to prevent jury nullification under any type of mandatory statute, legislators gave in and decided to legitimize the effects of jury nullification by enacting discretionary sentencing statutes. *Woodson v. North Carolina*, 428 U.S. at 291-293 (plurality opinion); *McGautha v. California*, 402 U.S. at 199. Jurors' reluctance about the death penalty and compassion for capital defendants had a pronounced effect upon sentencing under discretionary statutes. The result was that jurors operating under discretionary statutes returned death sentences in only a minority of first degree murder cases. *Woodson v. North Carolina*, 428 U.S. at 295

& n. 31, 302 (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 299 (Brennan, J., concurring). As Mr. Chief Justice Burger has noted, "juries have been increasingly meticulous in their imposition of the [death] penalty" and "[t]he very infrequency of death penalties imposed by jurors attests their cautious and discriminating reservation of the penalty for the most extreme cases." *Furman v. Georgia*, 408 U.S. at 388, 402 (Burger, C.J., dissenting).

The historical record rebuts petitioner's speculation that jurors will callously disregard their oaths and disobey their instructions in order to wrongfully convict a defendant of a capital crime. Instead, history shows that jurors are meticulous in their regard for the rights of capital defendants, extremely reluctant to convict when death is the penalty, and if they do disobey their oaths and instructions it is to favor the defendant.

This Court has relied in past cases upon the predictable compassion of jurors for the rights of capital defendants. The decision in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), was based upon the observation that jurors "express the conscience of the community on the ultimate question of life or death." *Id.* at 519-520 (footnote omitted); *accord*, *Furman v. Georgia*, 408 U.S. at 299 (Brennan, J., concurring). Indeed, a majority of this Court has recognized that the action of juries in capital cases is a reliable reflection of contemporary values and of the prevailing standards of decency in our society. *Coker v. Georgia*, 433 U.S. 584, 596-597 (1977) (plurality opinion of White, J., joined by Stewart, Blackmun, and Stevens, J.J.); *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.) [hereafter cited as "joint opinion"]; *Woodson v. North Carolina*, 428 U.S. at 293, 295 (plurality opinion of Stewart, Powell, and Stevens, J.J.); *Furman v. Georgia*, 408 U.S. at 440-441 (Powell, J., dissenting). In *McGautha v. California*, 402 U.S. 183, 207-208 (1971), this Court expressly held that States were entitled to assume that jurors in capital cases "will act with

due regard for the consequences of their decision . . ." That specific holding was not obliterated by *Furman*, but instead became one of the underpinnings of the plurality opinion in *Woodson v. North Carolina*, *supra*, which held that, "it is only reasonable to assume that many juries will continue to consider the consequences of a conviction in reaching a verdict." 428 U.S. at 303. The reason that mandatory statutes simply "papered over the problem of unguided and unchecked jury discretion," *id.* at 302, is the same reason that the preclusion of lesser included non-capital offenses by Alabama's statute does not undermine the integrity of the fact-finding process in capital cases — jurors are and always have been extremely cautious and reluctant to convict in any capital case in which death appears to be the automatic result, and they resolve doubts in such cases in favor of the capital defendant.

B. Alabama's Statute Contains Special Safeguards that Ensure the Reliability of the Fact-Finding Process

The Alabama capital punishment statute contains special safeguards which ensure the reliability of the fact-finding process and prevent the preclusion of lesser included offenses from resulting in a wrongful imposition of the death penalty. The first safeguard is the requirement of *Code of Alabama* 1975, §13-11-2 that before any defendant can be found guilty of a capital offense the jury must return a verdict form which "fix[es] the punishment at death," even though the judge and not the jury is the sentencing authority, see pp. 25-26, *infra*. The requirement that the jury in returning any guilty verdict "fix the punishment at death" ensures that the awesome nature and terrible responsibilities of the jury's task in finding the defendant guilty of a capital offense will be fully impressed upon each juror. It serves to reinforce the requirement of proof beyond a reasonable doubt by calling upon the historical reluctance of jurors to convict in any case where death is the result. The jury is encouraged to

think that "the buck stops here."[11]

The second safeguard contained in Alabama's statute is the mistrial mechanism. Section 13-11-2(c) provides:

> "The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole."

An "aggravated offense" is one of the capital crimes defined in section 13-11-2, and an "offense wherein the indictment does not allege an aggravated circumstance" is a non-capital crime. Therefore, when a defendant in a capital case is guilty of a serious non-capital crime but there is a reasonable doubt about his guilt of the capital offense, the jury is not required to choose between convicting or acquitting him. It has a third choice — mistrial. If there is a mistrial on the capital charge the defendant may be re-indicted and retried for a non-capital

[11]Of course, the trial court and not the jury actually makes the sentencing determination, see pp. 25-26, *infra*. The Alabama appellate courts have not addressed the issue of whether jurors may be informed that even if they convict a defendant and "fix the punishment at death" the judge actually determines whether the defendant will be sentenced to death or to life imprisonment without parole. In the present case, the trial court specifically declined to instruct the jury about the subsequent sentence hearing which would be held by the trial court if the jury returned with a guilty verdict (A. 11), and there is no indication in the record that the jury otherwise knew that the judge would ultimately determine the sentence. Even if the jury were told that the punishment it "fix[es]" is not final, the requirement that the jury verdict make express reference to the penalty of death would still serve to impress upon jurors the need for great caution.

offense.

At the request of petitioner's trial counsel, the jury in this case was expressly informed of its mistrial option during the oral charge:

> "The Court charges the jury that in the event that all of your number cannot agree upon a verdict, that judgment of mistrial must be entered by the Court and that Defendant may be tried again for the aggravated offense or may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance." (A. 13)

That instruction was read by the trial court after petitioner's counsel submitted it in writing (R. 910, A. 13).[12] Furthermore, during closing argument, petitioner's trial

[12]The Alabama Supreme Court has not yet addressed the issue of whether the trial court is required to instruct the jury on the mistrial option when requested to do so by the defendant. In *Phillip Wayne Tomlin v. State*, 1 Div. 23, slip op. at 12-13 (Ala. Cr. App., Nov. 20, 1979), the jury asked the trial court what would happen if there was a "hung jury," and the judge told them that in the event of a mistrial the same charge would be heard by another jury in the future. The defendant neither objected to the trial court's instructions nor requested any instruction about the re-indictment option. Slip op. at 13. On appeal, the Court of Criminal Appeals held that since the re-indictment option rested entirely with the state, the instruction was correct as far as it went, and if the defendant had wanted the jury to be instructed about the re-indictment option he should have asked the court to give such an instruction. Slip op. at 12-13. The Alabama Supreme Court has not yet reviewed that holding.

The court in *Evans v. Britton*, 472 F. Supp. 707, 715 n. 14 (S.D. Ala. 1979), expressed its opinion that there was a "practice in state courts in capital cases of not instructing the jury of their right to mistry the case." There was no support in the record in that case for such an observation. In any event, there has been no finding by any court that it is a "practice" of state courts to refuse to instruct jurors on the mistrial option when requested by the defendant to do so. In *Jacobs v. State*, 361 So.2d 607 (Ala. Cr. App. 1977), *aff'd*, 361 So.2d 640 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979), this Court denied certiorari in a capital case in which the record showed that the jury was instructed on the mistrial and re-indictment option at the request of the defendant. See Jacobs v. Alabama (U.S. October Term 1978, No. 78-5696, R. 568-569). In any event, in the present case, the petitioner requested and did receive the benefit of such an instruction.

counsel told the jury:

> "I'm not telling you that this man should not be punished. We told you from the beginning that we believe that punishment, life imprisonment. And I'll tell you this, if I can have any opportunity under any reindictment or any other way to take him before this bar of justice and enter a plea of guilty of murder, robbery, either one, life in prison, I'll take him. I'll take him . . ." (A. 62)

Therefore, the jury could not have been forced to choose between acquitting a defendant who was guilty of a serious non-capital offense or wrongfully convicting him of a capital offense for which he was not guilty. Instead, if the jury concluded that the defendant was not guilty of the capital offense but was guilty of a serious non-capital offense, then all it had to do to prevent his discharge was to fail to agree "on a verdict of guilty or not guilty or on the fixing of the penalty of death," and the petitioner could then be re-indicted and retried for the non-capital offense. That is what the statute expressly provides, that is what the court instructed the jury, and that in effect, is what petitioner's trial counsel asked the jury to do. The court noted in *Evans v. Britton*, 472 F. Supp. 707, 714-715 (S.D. Ala. 1979),[13] that at the time of the decision in that case (June 11, 1979) there had been mistrials in three cases tried under the Alabama capital punishment statute.[14]

Of course, if all of the members of the jury have a reasonable doubt about a defendant's guilt of the capital offense then it should return a verdict of acquittal, and the jury was so instructed in this case (A. 4, 9, 11, 13-15). The

[13]In the Federal Reporter advance sheets and in petitioner's brief the respondent's name in the style of that case is misspelled "Birton," and in the bound volume of the Federal Reporter it is misspelled "Birtton". The respondent in that case is Robert G. Britton, Commissioner of the Alabama Board of Corrections.

[14]Since the date of the *Evans v. Britton* opinion and the filing of the stipulation to which it refers, there have been mistrials in other cases tried under Alabama's capital punishment statute but those additional mistrials are not reflected in any opinion or other published source.

importance of the mistrial option is that is answers petitioner's speculative fears that a jury might violate such instructions and wrongfully convict a defendant of a capital offense rather than acquit him. The mistrial option means that even if a jury does disobey its instructions and refuse to acquit in such a circumstance, it still will not be compelled to wrongfully convict the defendant of a capital offense. Instead, it can simply refuse to reach a verdict or refuse to agree on the "fixing of the penalty of death" in the verdict form and thereby cause a mistrial.

The third safety device contained in Alabama's statute results from the sentencing function performed by the trial judge. Although the verdict of the jury convicting a defendant "fix[es] the punishment at death," section 13-11-2(a), the trial court judge and not the jury is the sentencing authority. *Code of Alabama* 1975, §§13-11-3 and 13-11-4; *accord, e.g., Jacobs v. State*, 361 So.2d 640, 644 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979); *Beck v. State*, 365 So.2d 985, 1001 (Ala. Cr. App.), *aff'd*, 365 So.2d 1006 (Ala. 1978); *Evans v. Britton*, 472 F. Supp. at 718. If the jury convicts the defendant of a capital offense, the sentencing process then begins. Under section 13-11-3, the trial court holds a sentence hearing for the purpose of determining the appropriate sentence for the particular defendant in that specific case. The statute provides that the purpose of the sentence hearing is "to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole." *Id.* In reversing and remanding a capital case for a new sentence hearing in *Mack v. State*, 375 So.2d 476, 500-501 (Ala. Cr. App. 1978), *aff'd*, 375 So.2d 504 (Ala. 1979), the Alabama Court of Criminal Appeals described the sentence hearing required under the statute as follows:

> "The sentencing hearing is one of the most important and critical stages under Alabama's death penalty law. The guilt stage has passed. Now an experienced trial judge must consider the particularized circumstances surrounding the offense

and the offender and determine if the accused is to die or be sentenced to life imprisonment without parole. It is a due process hearing of the highest magnitude and the exclusionary rules of evidence play no part. The trial evidence must be reviewed to determine all of the aggravating circumstances leading up to and culminating in the death of the victim and then all the mitigating circumstances must be considered in determining if any outweigh the aggravating circumstances so found in the trial court's findings of fact. Unless and until this is done 'the trial judge cannot fairly weigh the aggravating and mitigating circumstances, and the appellate court cannot adequately review his sentencing decision.' "

The statutory aggravating and mitigating circumstances which the trial court considers at the sentence hearing are set out in sections 13-11-6 and 13-11-7. With one minor difference, they are identical to the statutory aggravating and mitigating circumstances in the Florida statute upheld in *Proffitt v. Florida*, 428 U.S. 242, 248 n. 6 (1976).[15] In addition, unlike the Ohio statute struck down in *Lockett v. Ohio*, 438 U.S. 586 (1978), the Alabama statute does not limit the trial judge's consideration of mitigating circumstances to those enumerated in the statute. Instead, section 13-11-3 expressly provides that, "In the hearing evidence may be presented as to any matter that the court deems relevant to sentence . . ." The Alabama appellate courts have repeatedly held that the statute provides for the consideration of non-statutory mitigating circumstances. *E.g., Cook v. State*, 369 So.2d 1251, 1256 (Ala. 1979); *Jacobs v. State*, 361 So.2d 640, 652-654 (Ala. 1978); *see also, Evans v. State*, 361 So.2d 654, 664 (Ala. Cr. App. 1977), *aff'd*, 361 So.2d 666 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979).

The importance of the sentencing hearing and the

[15]The only difference is that Alabama's fourth aggravating circumstance omits the crimes of arson, aircraft piracy, and bombing from the list of felonies it contains.

consideration of non-statutory mitigating circumstances for the issue at hand is illustrated by the case of *Neal v. State*, 372 So.2d 1331 (Ala. Cr. App. 1979), *cert. denied*, 372 So.2d 1348 (Ala. 1979). In that case the defendant, like the petitioner in the present case, was convicted of robbery during the course of which the victim was intentionally killed. The capital crime also involved rape and was particularly heinous and atrocious. *Neal v. State*, 372 So.2d at 1347 (Decarlo, J., concurring) ("this debauchery and murder"); *id.* (Bowen, J., concurring) ("the savage and cold-blooded nature of this crime"). Nonetheless, the trial court sentenced the defendant to life imprisonment without parole instead of to death. In determining that that was the appropriate sentence, the trial court reviewed the evidence upon which the defendant was convicted and independently weighed it. After doing so, the trial court found as a non-statutory mitigating circumstance that:

> " 'While there was sufficient evidence for the jury to find Eddie Barnard Neal guilty, there was not the depth of evidence against him which this court must insist upon for the penalty of death to be invoked.' " 372 So.2d at 1346.

The trial court's sentencing determination can thus act as an additional safeguard to ensure that even if there is sufficient evidence to justify the jury in finding beyond a reasonable doubt that the defendant is guilty of the capital crime, no defendant will be sentenced to death unless the "depth of evidence against him" also convinces the trial court judge that the death penalty is warranted. Contrary to the assertions on pp. 16, 18, and 53 of petitioner's brief, in determining the sentence the trial court is not bound by any findings of fact implicit in the jury's verdict. See pp. 57-59, *infra*.

In *Evans v. Britton*, *supra*, the court rejected the argument that the preclusion of lesser included offenses might result in the wrongful execution of a defendant guilty of only a lesser included non-capital offense. In doing so, the court observed that adequate statutory safeguards

existed to prevent that. 472 F. Supp. at 715.

C. Juries in Capital Cases Tried Under the Alabama Statute Can be Trusted Not to Convict a Defendant Unless Convinced Beyond a Reasonable Doubt of His Guilt of the Capital Offense

The jury in this case was properly instructed to acquit the petitioner unless it was convinced beyond a reasonable doubt of each element of the capital offense (A. 4-5, 10-11, 13-14). Petitioner's argument is in essence that a jury cannot be trusted to follow those instructions. In *Parker v. Randolph*, 99 S.Ct. 2132, 2139 (1979) (plurality opinion of Rehnquist, J., joined by Burger, C.J., Stewart, and White, J.J.), this Court observed in regard to our system of trial by jury that:

> "A crucial assumption underlying that system is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed . . ."

As Mr. Justice White, joined by Mr. Chief Justice Burger and Mr. Justice Rehnquist, said in *Jurek v. Texas*, 428 U.S. 262, 279 (1976), "it should not be assumed that jurors will disobey or nullify their instructions." Mr. Chief Justice Burger has recognized "our basic trust in lay jurors as the keystone of our system of criminal justice," and has warned against casting doubt on the basic integrity of the jury system. *Furman v. Georgia*, 408 U.S. at 389, 402 (Burger, C.J., dissenting). Petitioner's argument does cast doubt on the basic integrity of our jury system, because it assumes that jurors will violate their oath and disobey their instructions, and especially because it assumes that they will do so in a capital case. In rejecting this same argument from a different petitioner, the court in *Evans v. Britton*, *supra*, said:

> "This Court would rather presume that jurors, especially in a capital case, will be true to their oaths and return verdicts in accordance with the facts and the law, rather than adopting petitioner's view that the jury can be expected to abdicate its responsibility. Indeed, to follow the petitioner's reasoning the Seventh Amendment would become a mockery in any criminal case, since no juror could be presumed to abide by his or her oath in considering issues presented." 472 F. Supp. at 715 (footnote omitted).

It is true that this Court has recognized that in some contexts, such as those involved in *Jackson v. Denno*, 378 U.S. 368 (1974), and in *Bruton v. United States*, 391 U.S. 123 (1968), the "practical and human limitations of the jury system," 391 U.S. at 135, override "the theoretically sound premise that a jury will follow the trial court's instructions." *Parker v. Randolph*, 99 S.Ct. at 2140 (plurality opinion). But this Court has also recognized that such cases are the exceptions, and "[t]he 'rule' — indeed the premise upon which the system of jury trials functions under the American judicial system — is that juries can be trusted to follow the trial court's instructions." *Id.* at 2140 n. 7. As the dissent in *Parker v. Randolph*, *supra*, noted, "the controlling question must be whether it is realistic to assume that the jury followed the judge's instructions . . ." 99 S.Ct. at 2147 (dissenting opinion of Stevens, J., joined by Brennan and Marshall, J.J.).

To support a negative answer to that question petitioner relies heavily on *Keeble v. United States*, 412 U.S. 205, 213 (1973), a case in which the court interpreted a federal statute as permitting convictions on lesser included offenses thereby avoiding what it termed the "difficult constitutional questions" which would otherwise be raised. The majority opinion in that case does refer to "the substantial risk that the jury's practice will diverge from theory" in that context. *Id.* at 212. It also opines that, "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense,

the jury is likely to resolve its doubts in favor of conviction." *Id.* at 212-213 (emphasis in original). But the teaching of *Parker v. Randolph*, *supra*, is that whether a jury can be trusted or not in a particular circumstance must be decided with reference to the specifics of the individual circumstance. The alteration of one specific factor in two apparently similar circumstances can cause, "the constitutional scales to tip the other way." *Parker v. Randolph*, 99 S.Ct. at 2140 (plurality opinion).

The preclusion of lesser included offenses in the present case is different from that in *Keeble* and that difference tips the scales the other way. First of all, *Keeble* was a non-capital case whereas the present case involves the preclusion of lesser included non-capital offenses in a capital case. At first glance, that difference would seem to support petitioner's position, since this Court has recognized a greater need for reliability in capital cases. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). But important cases should not be decided on a glance. More careful consideration compels the conclusion that the fact that this is a capital case actually helps ensure the reliability of the fact-finding process and removes any possibility that preclusion will result in a wrongful conviction for the higher or capital offense. This is true because, "Juries, of course, have always treated death cases differently . . ." *Furman v. Georgia*, 408 U.S. at 286 (Brennan, J., concurring). As was discussed on pp. 17-20, *supra*, the difference is that juries are extremely cautious in capital cases and they resolve any and all doubts against conviction when death is the penalty. This Court has relied in the past upon the predictability of such jury behavior in capital cases, see pp. 20-21, *supra*, and it should do so again in the present case.

The second major difference between *Keeble v. United States*, *supra*, and the present case is that there were no special statutory procedures which guarded against a

wrongful conviction of the higher offense in *Keeble*, but there are in the present case, see pp. 21-27, *supra*. For example, in *Keeble* the jurors were not told that they could refuse to agree on a verdict or on the penalty which would cause a mistrial and make it possible for the defendant to be reindicted for a lesser offense, but in the present case they were so instructed, see pp. 22-24, *supra*.

It is simply unrealistic to assume that the jury in the present case, or in any other capital case tried under Alabama's statute, would disobey their oaths and instructions, ignore the mistrial option, and wrongfully convict a defendant of a capital offense. Not only is such an assumption contrary to all the evidence and findings about jury behavior in capital cases, but it also ignores the practical effect of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Since capital juries are selected according to the dictates of that decision, they are especially unlikely to convict of a capital offense in spite of a reasonable doubt and return a verdict form which fixes the penalty at death.[16]

The statistics cited on p. 24 of petitioner's brief do not establish that juries have disregarded their instructions and wrongfully convicted defendants. Petitioner claims that a 96% conviction rate is "astonishing," but there is no evidence at all that the convictions referred to were based on anything but evidence proving beyond a reasonable doubt the capital offense charged. The lesser included offense doctrine developed to protect prosecutors from suffering acquittals when they failed to establish all the

[16]On page 23 of his brief petitioner quotes from a portion of Justice Shores' dissent in *Jacobs v. State*, 361 So.2d 640, 651-652 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979). In the portion omitted from the first sentence of that quotation, Justice Shores admitted that her "suggest[ion]" was not supported by the historical data. 361 So.2d at 651. Relying on historical data, a majority of the Alabama Supreme Court remarked in the same case, "We are further convinced that trial juries will consider the serious consequences of a guilty verdict and will either refuse to fix the penalty at death [causing a mistrial], or will acquit the defendant." 361 So.2d at 643, 645 (majority opinion).

elements of a higher offense. *E.g., Keeble v. United States*, 412 U.S. at 208. Given the fact that prosecutors know that they cannot rely on the protection of that doctrine in cases brought under Alabama's capital punishment statute, it is not suprising that they have been extremely cautious about prosecuting capital indictments. Nor is it surprising that only the strongest cases are prosecuted as capital cases. *See, Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (concurring opinion of White, J., joined by Burger, C.J., and Rehnquist, J.) ("the standards by which [prosecutors] decide whether to charge a capital offense will be the same as those by which the jury will decide the questions of guilt and sentence.")

If lesser included offenses were not precluded in capital cases, the prosecutor would have nothing to lose in bringing a capital indictment, but with preclusion he literally has everything to lose. No prosecutor likes to lose cases. In a case in which the prosecutor has any reason to doubt his ability to prove beyond a reasonable doubt each and every element of the capital offense, he is free to obtain a non-capital indictment, and he can be expected to do so. Even after a capital indictment is obtained, the prosecutor is free to re-indict on a non-capital charge and prosecute it instead of the original capital indictment, and that has happened.[17]

Alabama's statute defines fourteen different crimes as capital. *Code of Alabama* 1975, §13-11-2(a). The fact that only fifty capital cases had been tried during the two and three-quarter years covered by the statistics,[18] is further

[17]The statistics on p. 24 of petitioner's brief are taken from Respondent's Brief in Opposition to a Petition for a Writ of Certiorari, Jacobs v. Alabama (U.S. October Term, 1978, No. 78-5696), at 10, 35. That same brief contained in its Appendix A a list of cases in which capital indictments had been returned and their dispositions as of that time (December, 1978). Pages 3, 6, 11, and 12 of that appendix show that in at least four cases prosecutors began with capital indictments but subsequently obtained re-indictments for non-capital offenses.

[18]The effective date of the capital punishment statute was March 7, 1976, section 13-11-9, and the statistics referred to were filed on December 13, 1979. See n. 17, above.

evidence that only the strongest capital cases are prosecuted as capital cases.

In summary, petitioner has failed to establish that a jury cannot be trusted to properly perform its function under the Alabama capital punishment statute. In the words of the court in *Evans v. Britton*, 472 F. Supp. at 716, he "piles a supposition on top of an assumption to achieve the position that the burden of proof is lessened. This is simply too conjectural to bear consideration by the Court."

II.

THIS COURT HAS NEVER HELD THAT THE PRECLUSION OF LESSER INCLUDED OFFENSES IS UNCONSTITUTIONAL

This Court has never held that the preclusion of lesser included offenses violates the Due Process Clause or any other constitutional provision, and it should not do so in this case. While the majority opinion in *Keeble v. United States*, 412 U.S. 205 (1973), held that the defendant in that federal prosecution was "entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater," that holding was expressly based upon Federal Rule of Criminal Procedure 31(c), cases espousing the rule in federal prosecutions, and on an interpretation of the federal statute involved in that case. 412 U.S. at 208-213. The majority opinion did state that preclusion of lesser included offenses in that context would have raised difficult constitutional questions, 412 U.S. at 213, but the present context is materially different because there is greater assurance about the reliability of fact-finding in this case. See pp. 30-31, *supra*. In any event, the *Keeble* majority did not purport to answer the constitutional issues and instead expressly limited its decision to a holding that the federal act involved did not require preclusion. 412 U.S. at 214. The majority also noted that

the Court had never held that preclusion of lesser included offenses was a violation of due process. *Id.* at 213.[19]

In *Keeble*, Mr. Justice Stewart wrote a dissenting opinion which was joined by Mr. Justice Powell and Mr. Justice Rehnquist. 413 U.S. at 215-217. Those three Justices interpreted the federal statute involved as not permitting a lesser offense instruction, *id.*, even though the evidence supported such an instruction in that case. 412 U.S. at 208. Petitioner says that the *Keeble* dissent did not dispute "the majority's analysis of the protection accorded by the option of a lesser offense verdict to defendant's interest in reliable jury fact-finding," petitioner's brief at 20 n. 17. Instead, petitioner argues that the dissent merely held that the lesser offense was precluded as a jurisdictional matter. The dissenters did note that the reason the lesser included offense instruction was precluded was that the statute conveying federal court jurisdiction over the higher offense did not permit it. Since no one has ever contended that a federal statute could override the Due Process Clause, at least implicit in the dissenters' position is a view that the Constitution does not require a lesser offense instruction in every case where the evidence would support

[19]Contrary to the assertions on pp. 30-31 of petitioner's brief, the lower federal courts have not interpreted *Keeble* as constitutionalizing Federal Rule of Criminal Procedure 31(c). *Joe v. United States*, 510 F.2d 1038, 1042 (10th Cir. 1975) (". . . Keeble avowedly did not establish any new constitutional doctrine."), *United States v. Comer*, 421 F.2d 1149 (D.C. Cir. 1970), and *United States v. Tsansas*, 572 F.2d 340, 346 (2nd Cir.), *cert. denied*, 435 U.S. 995 (1978), all involved federal prosecutions and application of that federal rule. *United States ex. rel. Matthews v. Johnson*, 503 F.2d 339 (3rd Cir. 1974), *cert. denied sub nom., Cuyler v. Matthews*, 420 U.S. 952 (1975), simply held that it was unconstitutional to leave the question of whether to give lesser included offense instructions in the totally unregulated discretion of the trial court judge. The part of the district court decision petitioner cites from *United States ex rel. Powell v. Pennsylvania*, 294 F. Supp. 849, 852 (E.D. Pa. 1968), *appeal dismissed*, 425 F.2d 267 (3rd Cir. 1970), is purest dictum. On the other hand, the rejection of petitioner's arguments in *Evans v. Britton*, 472 F. Supp. 707, 714-717 (S.D. Ala. 1979), is not dictum.

a conviction for the lesser offense.[20]

Therefore, if there is any constitutional holding in *Keeble*, it is the implicit holding of the three dissenting Justices, a holding contrary to petitioner's position in the present case. The *Keeble* majority expressly did not decide whether the preclusion of lesser included offenses violated the Due Process Clause, and it did note that the Court had never answered that question.

Petitioner also relies on the nineteenth century cases of *Winston v. United States*, 170 U.S. 303 (1899), *Stevenson v. United States*, 162 U.S. 313 (1896), *Wallace v. United States*, 162 U.S. 466 (1896), and *Hopt v. Utah*, 110 U.S. 574 (1884). All involved federal or territorial prosecutions and were decided on the basis of statutory law. None purported to declare any constitutional requirement for instructions on lesser included offenses. Contrary to the assertion on p. 46 of petitioner's brief, neither the *Stevenson* case nor any other case establishes that preclusion of lesser included offenses violates a defendant's right to a fair trial. Instead, *Stevenson* held that preclusion was improper in a federal prosecution because the statutory predecessor of Federal Rule of Criminal Procedure 31(c) said it was. *Stevenson v. United States*, 162 U.S. at 315. The case of *Winston v. United States*, 172 U.S. 303 (1899), is the last in the line of nineteenth century cases cited by petitioner, and it summarized the cases simply as, "illustrating the steadfastness with which the full and free exercise by the jury of powers *newly conferred upon them by statute* in this matter has been upheld . . ." 172 U.S. at 312 (emphasis added).

The same is true of *Sansome v. United States*, 380 U.S. 343 (1965), and *Berra v. United States*, 351 U.S. 131 (1956).

[20]Mr. Justice Stewart's dissenting opinion did note that, "The Court does not reach any other possible ground for reversing this conviction, and, accordingly, neither do I." 412 U.S. at 215 n. 1. That remark appears to be a reference to the contentions of the petitioner in that case that his conviction was also due to be reversed because of a confession issue and an apparent defect in the indictment. *See*, 412 U.S. at 207 n. 4, 213 n. 13.

The dicta petitioner cites from those cases refers to the requirements of Federal Rule of Criminal Procedure 31(c) which does not apply in state courts. The court in *Keeble v. United States*, 412 U.S. at 213, recalled the limited nature of the holdings in those cases when it recognized that the Court had never held preclusion to violate due process.

Gregg v. Georgia, 428 U.S. 153 (1976), did not hold that the preclusion of lesser included offenses was unconstitutional. The petitioner in *Gregg* argued that there were so many opportunities for discretionary action inherent in the Georgia capital punishment statute that the arbitrariness and capriciousness condemned in *Furman* still remained. 428 U.S. at 198-199. Prosecutorial discretion, the de facto sentencing discretion inherent in the availability to the jury of lesser included offenses, and the discretionary exercise of executive clemency were pointed out as possible sources of arbitrariness and capriciousness in capital sentencing. 428 U.S. at 199. Rejecting petitioner's argument that these opportunities for discretion rendered the statute unconstitutional, the joint opinion held that *Furman* required only that the risk of abritrariness and capriciousness be minimized by objective sentencing standards. 428 U.S. at 199. It noted that a decision to afford an individual defendant mercy did not violate the Constitution. *Id.* The opinion contains some statements in a footnote which the petitioner in the present case misconstrues to support his position.

Following up its observation that a system is not unconstitutional simply because it provides opportunities for an individual defendant to be afforded mercy, the opinion notes in the footnote in question that a contrary holding would effectively outlaw capital punishment by placing unrealistic conditions on its use. 428 U.S. at 199 n. 50. In explanation, the opinion says that a system which sought to end all sources of discretion would have to forbid executive clemency and plea bargaining, would have to require prosecutors to charge a capital offense every time

one had even arguably been committed, and it would also have to require that when a jury refused to convict even though the evidence supported the capital charge its verdict of acquittal be reversed. *Id.* The opinion then notes that a system which did these specified things "would be totally alien to our notions of criminal justice," and it points out that reversing a jury's verdict of acquittal would be unconstitutional. *Id.* Contrary to the assertions on pp. 16, 56, and 63 of petitioner's brief, it does not say that the preclusion of lesser included offenses would be alien to our notions of criminal justice or unconstitutional. Indeed, the opinion quite conspicuously omits the preclusion of lesser included offenses from the list of actions which it says in the footnote would be alien to our notions of criminal justice and unconstitutional. *Id.*[21]

III.

THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES BY ALABAMA'S CAPITAL PUNISHMENT STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE

A. The Preclusion of Lesser Included Non-Capital Offenses by Alabama's Statute Does Not Undermine the Proof Beyond a Reasonable Doubt Standard

This Court held in *In re Winship*, 397 U.S. 358 (1970), that the requirement of proof beyond a reasonable doubt is an essential right protected by the Due Process Clause. Seeking that same status for the availability of lesser included offenses, petitioner's principal contention is that the preclusion of lesser included offenses undermines the requirement of proof beyond a reasonable doubt and

[21]Since the Georgia statute did not preclude lesser included offenses, any observation about the subject in the footnote that petitioner relies upon would be dictum anyway. Mr. Justice Frankfurter once noted that, "[a] footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine," *Kovacs v. Cooper*, 336 U.S. 77, 90-91 (1949) (concurring opinion), and that would seem especially true when the footnote contains dictum in an opinion joined by only three members of the Court.

thereby jeopardizes the reliability of fact-finding. The strategy of petitioner's argument is to elevate the availability of lesser included offenses to constitutional status by piggybacking it onto the reasonable doubt standard.

The Alabama Legislature incorporated into the capital punishment statute special safeguards to strengthen the reliability of the fact-finding process and to ensure that a defendant would not be convicted unless the jury was convinced beyond a reasonable doubt of his guilt of the capital offense. See pp. 21-28, *supra*. Regardless of the motives behind the preclusion clause,[22] its adoption reflects a considered legislative judgment that the availability of lesser included non-capital offenses is not essential to enforcing the proof beyond a reasonable doubt standard under a capital statute that contains those safeguards. Petitioner's argument to the contrary is based on speculative assumptions. Not only does petitioner ignore the special statutory safeguards built into Alabama's statute, but he also ignores long-standing perceptions of this Court about the behavior of juries in capital cases. See pp. 20-21, *supra*.

In *Johnson v. Louisiana*, 406 U.S. 356, 359-360 (1972), this Court rejected the argument that the jury unanimity requirement was essential to give substance to the reasonable doubt standard. In doing so, this Court said, "before we alter our own long-standing perceptions about jury behavior and overturn a considered legislative judgment that unanimity is not essential to reasoned jury verdicts, we must have some basis for doing so other than unsupported assumptions." 406 U.S. at 362. Petitioner in the present case offers unsupported assumptions. The historical evidence concerning jurors' behavior in capital cases, this Court's previous perceptions of and reliance on the predictability of that behavior, and the special safeguards built into Alabama's statute all compel the

[22]The legislative purpose behind the preclusion of lesser included offenses is discussed on pp. 45-49, *infra*.

conclusion that the availability of lesser included offenses is not necessary to give substance to the proof beyond a reasonable doubt standard. See pp. 17-31, *supra*. Accordingly, lesser included offenses cannot be elevated to the status of an essential of due process by piggybacking them onto the reasonable doubt standard.[23]

B. The History of Lesser Included Offenses Does Not Establish a Due Process Right to the Availability of Them

Petitioner argues that the history of lesser included offenses and their availability in other contexts and jurisdictions justifies recognizing the lesser included offense option as a fundamental due process right. Petitioner's reliance on history fails for two reasons. First, history does not show that the lesser included offense doctrine developed to protect any rights or interests of defendants. Instead, history shows that the doctrine was designed and developed to assist the prosecution when the evidence failed to establish some element of the offense charged. *E.g., Keeble v. United States*, 412 U.S. 205, 208 (1973); *Kelly v. United States*, 370 F.2d 227 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 913 (1967); *United States v. Markis*, 352 F.2d 860, 866 (2nd Cir. 1965).

The second reason why the history of lesser included offenses fails to establish that their availability is a due process right is that history alone does not define due process. For example, in *Johnson v. Louisiana*, 406 U.S.

[23]Nor can the preclusion of lesser included offenses be equated with an irrebuttable presumption as petitioner attempts to do in n. 27 on p. 32 of his brief. The Alabama statute does not irrebuttably presume that a defendant indicted for a capital offense is not guilty of some lesser included offense. Instead, the statute simply operates to require that the defendant be acquitted of the capital charge if he is guilty only of a lesser offense or of no offense at all. Using petitioner's approach, which goes beyond the cases that he cites in support of it, virtually every rule of law is unconstitutional as an irrebuttable presumption. For example, using petitioner's terminology, a statute of limitations is "in effect" an irrebuttable presumption against a finding of guilt of a crime committed outside the period prescribed in the statute of limitations.

356 (1972), this Court rejected the argument that due process required a unanimous jury and it did so in spite of the fact that the unanimous jury was "embedded in our legal history," *id.* at 382 n. 1 (Douglas, J., dissenting), and originated long before the American Revolution, as early as the 14th century. *Id.* at 383 n. 2. *See also, Apodaca v. Oregon*, 406 U.S. 404, 407 & n. 2, 408 (1972). Another example of a historically well established device that has been denied constitutional status is the twelve-member jury. In *Williams v. Florida*, 399 U.S. 78 (1970), this Court held that States were not constitutionally required to use twelve-member juries even though that had been the fixed number of jurors since the middle of the 14th century, *id.* at 87 n. 19, 89, even though earlier decisions had assumed that number was constitutionally required, *id.* at 90-91, and even though the federal courts and virtually all the States used that number. *Id.* at 103 n. 50; *Id.* at 136-137 (Harlan, J., concurring).

In *Johnson v. Louisiana, supra, Apodaca v. Oregon, supra*, and *Williams v. Florida, supra*, this Court rejected a purely historical approach and employed a functional analysis instead. Using the same type of analysis in the present case, the availability of lesser included offenses is not constitutionally required because, at least under Alabama's capital punishment statute, it is not necessary to give substance to the reasonable doubt standard and is not necessary to ensure the reliability of the fact-finding process. See pp. 17-33, *supra*.[24]

[24]The argument in n. 22 on p. 26 of petitioner's brief attempts to cast the issue in Sixth Amendment terms by arguing that the preclusion of lesser included offenses undermines the impartiality of the jury. It seems a bit strained to apply the language of partiality or impartiality to the present situation. However, if that language is to be used, then for the same reasons that preclusion does not undermine the proof beyond a reasonable doubt standard and jeopardize the reliability of the fact-finding process, it also does not produce verdicts that are the result of partiality.

C. The Use of the Lesser Included Offense Option in Other Contexts and Jurisdictions Does Not Establish a Due Process Right to the Availability of It

The fact that the lesser included offense option is available in virtually all other contexts and jurisdictions does not mean that due process requires it. The lesser included offense device developed not in response to due process concerns but for the purpose of assisting the prosecution, see p. 39, *supra*, and its widespread use may well reflect nothing more than its usefulness for that purpose. In any event, the purpose of the Due Process Clause is not to force on any state a kind of uniform code of criminal procedure based upon the procedure of other states or of the federal government. Many cases recognize this principle.

In *Patterson v. New York*, 432 U.S. 197, 211 (1977), this Court held that the fact a majority of states had assumed the burden of disproving affirmative defenses did not mean that those states which followed a different practice violated due process. *See also, Williams v. Florida*, 399 U.S. 78, 103 & n. 50, 136-137 (1970) (holding that Florida's provision of six-member juries in all non-capital felony cases did not violate the Sixth Amendment even though the federal courts and forty-five states use twelve-member juries in all or most felony cases). Nor does the principle change when a state stands alone.

Only one state, Louisiana, authorizes a conviction on a 9 to 3 vote of the jury, *Williams v. Florida*, 399 U.S. at 137-138 (concurring opinion and appendix of Harlan, J.), yet this Court held in *Johnson v. Louisiana*, 406 U.S. 356 (1972), that despite the singularity of Louisiana's practice it was not violative of the Due Process Clause. Likewise, *Leland v. Oregan*, 343 U.S. 790 (1952), held that Oregon's rule requiring that a defendant prove the defense of insanity beyond a reasonable doubt was not a violation of due process. In *Patterson v. New York*, 432 U.S. 197, 204-

205 (1977), this court recognized the continuing validity of the *Leland* decision even though it noted that Oregon was the only state that placed such a requirement on the defendant.

These cases reflect important principles of federalism. As this Court said in *Addington v. Texas*, 99 S. Ct. 1804, 1812 (1979), "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." The problem of reducing arbitrariness and capriciousness in capital sentencing has vexed legislators and members of this Court. Alabama's statutory system of precluding lesser included offenses while providing safeguards to insure the reliability of the fact-finding process represents a considered judgment about how to solve that problem. See pp. 45-50, *infra*. While Alabama's solution may be unique and may not itself be constitutionally required, that does not mean that it is unconstitutional. Since Alabama's system does not undermine the proof beyond a reasonable doubt standard and does not jeopardize the reliability of fact-finding in capital cases, Alabama should not be forced into a common, uniform mold. This is particularly true since the configuration of that mold seems to change so frequently.

IV.

THIS COURT SHOULD NOT CONSIDER PETITIONER'S EQUAL PROTECTION CLAIM BECAUSE HE DID NOT RAISE IT BELOW

Petitioner's claim that the preclusion of lesser included non-capital offenses by Alabama's statute violates the Equal Protection Clause is raised for the first time before this Court. He did not raise the equal protection issue before the trial court (A. 55), nor did he raise it in his appeal to the Alabama appellate courts. Neither the Alabama Court of Criminal Appeals nor the Alabama Supreme Court decided the equal protection issue (A. 17-52, 53-54).

When a state appellate court fails to pass on a particular

federal question, this Court should presume that it was due to the want of proper presentation, unless the aggrieved party can show to the contrary. *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974); *Street v. New York*, 394 U.S. 576, 582 (1969). Even without such a presumption, petitioner's failure to raise the equal protection issue is clear from the Alabama Court of Criminal Appeals' opinion which lists all of the claims he did present to it (A. 38-39), and from the Alabama Supreme Court's statement that petitioner raised only one issue, a state law issue, before that court (A. 53).

On p. 14 of his brief, petitioner states that in his petition to the Alabama Supreme Court he reiterated the federal constitutional contentions he had made to the Alabama Court of Criminal Appeals. Even if he did, petitioner did not contend to the Court of Criminal Appeals that the statute violated the Equal Protection Clause. In any event, an examination of the petition to the Alabama Supreme Court, which is not part of the record before this Court, reveals that petitioner's only reference to the United States Constitution was a bare assertion that the Alabama statute "violates provisions of the Constitution under the 8th, 6th and 14th Amendments to the Constitution of the United States and is in fact a mandatory death sentence." Petition for Writ of Certiorari, Beck v. State (Alabama Supreme Court No. 77-530) at 2.

In his brief to the Alabama Supreme Court, petitioner abandoned all federal claims and argued only an issue involving the state constitution. Brief on Behalf of Petitioner, Beck v. State (Alabama Supreme Court No. 77-530) (A. 53).[25] The first time that petitioner even mentioned the words "equal protection" was before this Court.

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[25]In deciding that state constitutional issue which involved sentencing, the Alabama Supreme Court cited its previous decision in *Jacobs v. State*, 361 So.2d 640 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979), which upheld the statute's sentencing procedures. The *Jacobs* decision did not address any equal protection issue.

Because petitioner did not present the equal protection issue to the courts below and it was not decided by them, this Court need not decide it, *Moore v. Illinois*, 408 U.S. 786, 799 (1972), should not decide it, *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974), and has no jurisdiction to decide it. *Street v. New York*, 394 U.S. 576, 581-582 (1969); *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945); *see* 28 U.S.C. §1257 (2) and (3).

V.

THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES BY ALABAMA'S STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

A. Although Not Constitutionally Required, the Preclusion of Lesser Included Non-Capital Offenses is a Legitimate and Permissible Means of Reducing Arbitrariness and Capriciousness in Capital Sentencing

The decisions in *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (joint opinion), *Proffitt v. Florida*, 428 U.S. 242, 254 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.) [hereinafter cited as "joint opinion"], and *Jurek v. Texas*, 428 U.S. 262, 274 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.) [hereinafter cited as "joint opinion"], establish that the amount of, or risk of, arbitrariness and capriciousness in capital sentencing may be reduced to a constitutionally acceptable level without precluding lesser included non-capital offenses.[26] That holding is simply one aspect of this Court's recognition that, even after *Furman*, perfection is not required in capital sentencing. *See, e.g., Gregg v. Georgia*, 428 U.S. at 226 (concurring opinion of White, J., joined by Burger, C.J.. and Rehnquist, J.)

[26]None of those cases held that the preclusion of lesser included non-capital offenses was not permissible. Plaintiff's contention that the joint opinion in *Gregg* so held is discussed at pp. 36-37, *supra*.

("Mistakes will be made and discriminations will occur which will be difficult to explain."); *Woodson v. North Carolina*, 428 U.S. 280, 317-319 (1976) (Rehnquist, J., dissenting) (recognizing defects inherent in the Georgia, Florida, and Texas statutes). The constitutional minimum which has been enforced is, "a system that does not create a substantial risk of arbitrariness or caprice." *Gregg v. Georgia*, 428 U.S. at 203 (joint opinion); *see also, id.* at 188.

The fact that the Georgia, Florida and Texas statutes were held to meet the constitutional minimum without precluding lesser included offenses does not mean that another state cannot strive to do even better. After describing the sentencing procedures held to be acceptable in *Gregg*, the joint opinion in that case said:

> "We do not intend to suggest that only the above-described procedures would be permissible under Furman or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of Furman, for each distinct system must be examined on an individual basis. Rather, we have embarked on this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting Furman's constitutional concerns." 428 U.S. at 195 (footnotes omitted).

Furman's constitutional concerns were that the administration of capital punishment statutes: had been "pregnant with discrimination," *Furman v. Georgia*, 408 U.S. at 257 (Douglas, J., concurring); had permitted the death penalty to be "wantonly" and "freakishly" imposed, *id.* at 310 (Stewart, J., concurring); and had resulted in the death penalty being imposed with such "great infrequency" that there was "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not," *id.* at 313 (White, J., concurring). *Accord, id.* at 293, 305 (Brennan, J., concurring); *Gregg v. Georgia*, 428 U.S. at 188 (joint opinion).

The preclusion of lesser included non-capital cases serves to meet those concerns by removing an historically proven and logically inescapable source of discretion that can interject an amount of arbitrariness and capriciousness into capital sentencing. While *Gregg*, *Proffitt*, and *Jurek* stand for the proposition that the amount or risk of arbitrariness resulting from the availability of lesser included offenses is not so substantial as to itself violate the Constitution, Alabama should be free to decide that it can go beyond the minimum and reduce the level of arbitrariness and capriciousness even further than required.

The history of lesser included offenses demonstrates their potential as a source of de facto sentencing discretion that can lead to some degree of arbitrariness and capriciousness in the administration of capital punishment. *See, Woodson v. North Carolina*, 428 U.S. 280, 291, 293 & n. 29, 302 (1976) (plurality opinion); *id.* at 311-313 (Rehnquist, J., dissenting); *McGautha v. California*, 402 U.S. 183, 199 (1971); *Furman v. Georgia*, 408 U.S. at 246-247 (1972) (Douglas, J., concurring). The principal reason the mandatory death penalty statute in *Woodson v. North Carolina, supra*, "simply papered over the problem of unguided and unchecked jury discretion," 428 U.S. at 302-303 (plurality opinion), was that it permitted the jury to convict on lesser included non-capital offenses. All that a North Carolina jury had to do to avoid the imposition of the death penalty under that statute was to return a verdict for second degree murder. The same was true of the Louisiana statute struck down in *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976), where the plurality reasoned that the availability of lesser included offenses "plainly invite[d] the jurors to disregard their oaths and choose a verdict of a lesser offense whenever they feel that the death penalty [was] inappropriate," thereby interjecting an element of capriciousness. 428 U.S. at 334-335 (plurality opinion). The prediction upon which *Roberts* is bottomed is that at least

some Louisiana juries would convict of only a lesser included offense even though all the jurors were convinced that the greater capital offense had been proven. *Woodson v. North Carolina*, 428 U.S. at 314 (Rehnquist, J., dissenting).

While the use of lesser included offenses as a mechanism of de facto sentencing discretion is more obvious in mandatory statutes and will more frequently lead to arbitrariness and capriciousness under such statutes, the same result can occur under non-mandatory statutes. As Mr. Chief Justice Burger noted in *Furman*, "there is no assurance that sentencing patterns will change so long as juries are possessed of the power to . . . bring in a verdict of guilt on a charge carrying a lesser sentence." *Furman v. Georgia*, 408 U.S. at 401 (Burger, C.J., dissenting).[27] This is true, because whenever a statute, "gives the jury the power to find guilt in a lesser degree, the law leaves the jury great leeway." *Witherspoon v. Illinois*, 391 U.S. 510, 529 (1968) (separate opinion of Douglas, J.). That leeway results in part from what the *Woodson* plurality called the "amorphous nature of the controlling concepts of willfulness, deliberateness, and premeditation," which are usually employed to separate first degree murder from murder in the second degree, *Woodson v. North Carolina*, 428 U.S. at 290-291, and which leave room for the play of jurors' prejudices and emotions. The potential for lesser included offenses being used as a de facto outlet for sentencing considerations is exacerbated by the practical effect of the *Witherspoon* decision. By holding out for a conviction on a non-capital lesser included offense even when they are convinced that the defendant has committed the capital offense, jurors who have concientious scruples

[27] In that same opinion, Mr. Chief Justice Burger went on to express displeasure with the prospect of a mandatory death penalty statute precluding lesser included offenses and resulting in a system in which the death sentence could only be avoided by a verdict of acquittal. 408 U.S. at 401. Alabama's statute is not a mandatory death penalty statute, and a convicted capital defendant can receive a sentence other than death. See pp. 25-27, *supra*, and pp. 54-57, *infra*.

against the death penalty can avoid any possibility that that penalty will later be imposed by the sentencing authority. This element of capriciousness is especially likely to infect the guilt stage where, as here, the sentencing authority is the judge and not the jury, see pp. 25-26, *supra*.

A state has abundant reasons for choosing to make the trial court judge the sentencing authority. The inexperience of jurors in dealing with sentencing information is a problem inherent in any system which gives jurors a voice in the sentencing determination. *Gregg v. Georgia*, 428 U.S. at 192 (joint opinion). Because trial court judges are more experienced in sentencing, judicial sentencing in capital cases has the potential for achieving greater rationality and consistency of results. *Proffitt v. Florida*, 428 U.S. at 252 (joint opinion); *accord*, *Beck v. State*, 365 So.2d 985, 1001 (Ala. Cr. App. 1978), *aff'd*, 365 So.2d 1006 (Ala. 1978) (A. 43). It also helps make appellate review of sentencing decisions, which was found so constitutionally valuable in *Gregg* and *Proffitt*, more effective by providing a detailed objective record of the factors considered by the sentencer at the trial level.

The preclusion of lesser included offenses is more important when the judge is the sentencing authority than when the jury sentences in a capital case. If the jury has a substantial or decisive say in the sentencing decision, as in Florida or Georgia, then it is less likely that the jury's determination of guilt will be infected by the desire of any jurors to avoid imposition of the death penalty. Those jurors who oppose the death penalty can vent their feelings during the sentencing stage. However, if a state elects to pursue the advantages of judicial sentencing to the utmost and thereby maximize consistency and rationality in capital sentencing, as Alabama has done, then those jurors who oppose capital punishment in a particular case or in general cannot use the sentencing stage to prevent imposition of the death penalty. Such jurors can work against the imposition of the death penalty only during the guilt determination stage.

The availability of lesser included offenses not only makes that possible, but also relatively easy. Jurors who are motivated by opposition to the death penalty are much more likely to convince their fellow jurors to convict a guilty capital defendant of a lesser included offense carrying a lengthy prison sentence than they are to convince their fellow jurors, even if they can convince themselves, to acquit the guilty capital defendant. Whenever a defendant guilty of a capital offense escapes conviction for that offense through the lesser included offense mechanism, some capriciousness in overall sentencing results. The preclusion of lesser included non-capital offenses is thus a rational means of striving for the greater consistency promised by a system of judicial sentencing in capital cases.

There is an additional reason why the preclusion of lesser included offenses is valuable under Alabama's statute. The statute requires that any verdict of the jury convicting the defendant of a capital offense, "fix the penalty at death." *Code of Alabama* 1975, §13-11-2(a). This requirement does not make the Alabama statute a mandatory one because the judge, who is the actual sentencing authority, may sentence a convicted capital defendant to life imprisonment without parole. See pp. 25-26, *supra*, and pp. 54-57, *infra*. The requirement that the jury verdict form "fix the penalty at death" serves the constitutionally laudable purpose of bringing home to the jury the need for great caution and helps ensure that the jury will convict of the capital offense only when it is truly convinced beyond a reasonable doubt and to a moral certainty that the defendant is guilty of it. See pp. 21-22, *supra*. Because Alabama has chosen to safeguard the reliability of fact-finding in capital cases in this manner, the preclusion of lesser included non-capital offenses is a rational means of ensuring that de facto sentencing discretion is not simply "papered over" but instead is properly limited to prevent capricious sentencing results. Other states have chosen not

to use the same procedures, but *Gregg v. Georgia*, 428 U.S. at 195 (joint opinion), noted that the statutes upheld by this Court so far are not the only permissible way to pursue the same constitutional goals, and each distinct system must be examined on an individual basis.

B. The Distinction Between Capital and Non-Capital Cases is Rationally Related to the Legitimate Purpose Served by the Preclusion of Lesser Included Offenses

Under the traditional equal protection test, a legislative classification is presumed to be valid. *E.g., Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976); *Schlib v. Kuebel*, 404 U.S. 357, 364 (1971). The classification violates the Equal Protection Clause if it is based on criteria, "wholly unrelated to the objective of the statute," *Reed v. Reed*, 404 U.S. 71, 76 (1971), but does not violate the clause if it bears some rational relationship to a legitimate state purpose. *E.g., San Antonio School District v. Rodriguez*, 411 U.S. 1, 40 (1973); *McGinnis v. Royster*, 410 U.S. 263, 270, 276 (1973); *Schlib v. Kuebel*, 404 U.S. at 364-368.

The legitimate state purpose behind the preclusion of lesser included non-capital offenses is the reduction of the risk or level of arbitrariness and capriciousness in capital sentencing by the removal of a mechanism for unguided de facto sentencing discretion. See pp. 45-49, *supra*. Since the availability of lesser included offenses in non-capital cases does not pose any risk to the consistency of capital sentencing, the differentiation between capital and non-capital cases is rational, *Evans v. Britton*, 472 F. Supp. 707, 716 (S.D. Ala. 1979), being wholly determined by the purpose of preclusion. Any argument that consistency and rationality in sentencing is not more important in capital than in non-capital cases is contrary to *Furman*.

Petitioner argues that the purpose behind preclusion is "illusory" because *Gregg* and some of its companion cases held that preclusion is not constitutionally required. That

argument wrongly assumes that Alabama intended only to meet the minimum constitutional requirements concerning capital sentencing and that any purpose above and beyond that is illegitimate. Petitioner offers no support for this assumption.[28] Where two or more purposes are possible, a legislative classification should be upheld if any one justifies it. *E.g., McGinnis v. Royster*, 410 U.S. at 276-277; *Dandridge v. Williams*, 397 U.S. 471, 486 (1970); *McGowan v. Maryland*, 366 U.S. 420, 425-427 (1961). Otherwise, no state could safely enact any legislation without expressly listing all the purposes and motives of every legislator who voted for it.

On p. 67 of his brief, petitioner argues that the distinction between capital and non-capital defendants is constitutionally defective because the availability of lesser included offenses turns "merely on the basis of the prosecutor's discretionary decision to file a capital, rather than a non-capital, charge." That argument sweeps too broadly. If it is accepted, no procedural distinction between capital and non-capital cases can ever be made, because the availability of the difference in procedure will always turn "merely on the basis of the prosecutor's discretionary decision to file a capital rather than a non-capital charge." The same logic, or lack of it, would apply to the distinction between any higher offense and its lesser included offenses.

Most of petitioner's equal protection argument is premised on his contention that the availability of lesser included offenses is a procedural safeguard the denial of

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[28]Petitioner does cite Respondent's Brief in Opposition to Petition for Writ of Certiorari, Jacobs v. Alabama (U.S. October Term 1978, No. 78-5696), but such a brief is hardly equal to a formal declaration of legislative purpose. The brief did say that preclusion helped ensure that de facto sentencing discretion did not result in capital sentencing that was inconsistent with the Constitution. *Id.* at 24. It also said that preclusion was necessary to attain the full advantages of judicial sentencing. *Id.* at 25. Both statements are true, but they do not justify a conclusion that the only purpose of preclusion was to meet minimum constitutional requirements.

which jeopardizes due process rights. That premise should be rejected for the reasons discussed previously in this brief. See pp. 17-42, *supra*. The overlap of petitioner's due process and equal protection arguments is especially obvious in his contention that strict scrutiny should be applied.

C. The Strict Scrutiny Test is Not Applicable Because the Classification Does Not Infringe a Fundamental Right

Strict judicial scrutiny of a classification is appropriate under the Equal Protection Clause only when the classification operates to the disadvantage of a suspect class or infringes upon a fundamental right. *E.g., Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973). This Court has never declared capital defendants to be a suspect class for equal protection purposes, and petitioner does not press for that proposition in his brief. Instead, petitioner's argument for strict scrutiny is based upon his contention that the preclusion of lesser included offenses infringes upon a fundamental right.[29]

As this Court held in *San Antonio School District v. Rodriguez, supra*, the only rights which are "fundamental" for purposes of invoking strict scrutiny are those which are "explicitly or implicitly guaranteed by the Constitution." 411 U.S. at 33-34. To the extent that petitioner's argument for strict scrutiny claims that the availability of lesser included offenses is itself a "fundamental right," then the argument must fail because the Constitution neither

[29]Petitioner does state in a footnote that strict scrutiny should be applied because capital defendants can be termed a "discrete and insular minority" lacking, due to their "special condition," the ability to readily invoke the "political processes ordinarily to be relied upon to protect minorities." Petitioner's brief at p. 62, n. 52. Exactly the same things can be said about prisoners, and to adopt petitioner's rationale would require that the Court apply strict scrutiny to all laws and regulations relating to prisoners.

explicitly or implicitly guarantees the availability of lesser included offenses. See pp. 33-42, *supra*. To the extent that petitioner's argument is based upon a claim that preclusion of lesser included offenses infringes his fundamental right to the proof beyond a reasonable doubt standard or to reliable fact-finding, then that argument must fail because preclusion under Alabama's statute does not undermine the beyond a reasonable doubt standard or jeopardize the reliability of fact-finding, and therefore capital defendants lose no protection under the statute. See pp. 17-33, *supra*.

The infringement upon a fundamental right component of petitioner's strict security argument assumes as its premise that for which he argues on the due process issue. By clothing his due process contentions in the guise of equal protection, petitioner would have this Court disregard the wisdom of its own words, when it said, that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio School District v. Rodriguez*, 411 U.S. at 33 (majority opinion); *accord, id.* at 59 (Stewart, J., concurring).

In summary, this Court should not consider petitioner's equal protection claim, because he did not raise it in the courts below. See pp. 42-44, *supra*. Alternatively, that claim should be rejected on the merits.

VI.

THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES BY ALABAMA'S STATUTE DOES NOT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE OF THE EIGHTH AMENDMENT

A. Preclusion Does Not Make Alabama's Statute a Mandatory Capital Punishment Statute and It Does Not Prevent Individualized Sentencing

Unlike the statutes struck down in *Woodson v. North*

Carolina, 428 U.S. 280 (1976), *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976), and *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977), the Alabama statute is not a mandatory death penalty act. A mandatory death penalty statute is one which requires that every defendant convicted of a capital offense be sentenced to death, without regard to the character and record of the individual defendant and the circumstances of the particular capital offense. *Woodson v. North Carolina*, 428 U.S. at 286-287, 304. *Roberts (Stanislaus) v. Louisiana*, 428 U.S. at 331, 333; *Roberts (Harry) v. Louisiana*, 431 U.S. at 634 n. 1, 636-637. Alabama's statute expressly provides that a defendant convicted of a capital offense may be sentenced to life imprisonment without parole instead of death, *Code of Alabama* 1975, §§13-11-3 and 13-11-4, and as of December, 1978, eighteen defendants convicted of capital offenses had in fact been sentenced to life imprisonment without parole.[30] That fact alone establishes that Alabama's statute is not a mandatory death penalty act. *Evans v. Britton*, 472 F. Supp. 707, 718 (S.D. Ala. 1979).

On p. 54 of his brief, petitioner quotes a passage from Mr. Chief Justice Burger's dissenting opinion in *Furman*. In the passage quoted, Mr. Chief Justice Burger stated that he would have preferred that the Court have abolished capital punishment if the only alternative was a statute which coupled mandatory sentencing with the preclusion of lesser included offenses so that "the death sentence could only be avoided by a verdict of acquittal." 408 U.S. at 401

[30]Page 24 of petitioner's brief cites Respondent's Brief in Opposition to Petition for Writ of Certiorari, Jacobs v. Alabama (U.S. October Term, 1978, No. 78-5696), at 10, 35, for the fact that of the first 45 defendants who had been convicted of a capital offense after pleading not guilty and had been sentenced, 37 had been sentenced to death and 8 to life imprisonment without parole. The appendix of that same brief reveals that another 10 defendants had been sentenced to life imprisonment without parole after being convicted of a capital offense following a plea of guilty. The brief and appendix were filed on December 13, 1978. See also pp. 64-65, *infra*.

(Burger, C.J., dissenting). Petitioner's reliance on that passage in the present case is misplaced, because Alabama's statute is not a mandatory death penalty act and a verdict of acquittal is not the only way to avoid a sentence of death under it.[31]

On pp. 53 and 57 of his brief, petitioner argues that preclusion is contrary to *Woodson* and *Lockett* because, he says, it prevents juries from focusing on "the circumstances of the particular offense." *Woodson* and *Lockett* held that it was unconstitutional to prevent the sentencing authority from considering "the circumstances of the particular offense" and other factors in reaching a sentence decision, but neither of those two cases nor any other case has held that the jury must be the sentencing authority. *See, Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (joint opinion) ("This Court . . . has never suggested that jury sentencing is constitutionally required."); *Lockett v. Ohio*, 438 U.S. 586, 633 (1978) (Rehnquist, J., dissenting); *Richmond v. Arizona*, 434 U.S, 1323 (1977) (opinion of Rehnquist, J., as Circuit Justice); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *Beck v. Alabama*, 365 So.2d 985, 1001 (Ala. Cr. App.), *aff'd*, 365 So.2d 1006 (Ala. 1978) (A. 42-43).

Section 13-11-2 does require that before a defendant can be found guilty of a capital offense the jury must return a verdict form which "fix[es] the punishment at death." The purpose of that requirement is to reinforce the proof beyond a reasonable doubt standard and safeguard the reliability of the fact-finding process at the guilt stage. See pp. 21-22, *supra*. Even though the jury's verdict form must make that reference to the penalty of death, the jury does not determine the sentence. The judge and not the jury is the sentencing authority. *Code of Alabama* 1975, §§13-11-3 and 13-11-4; *accord, e.g., Jacobs v. State*, 361 So.2d 640, 644 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979); *Beck v. State*,

[31]Petitioner's contention that the joint opinion in *Gregg* states that the preclusion of lesser included offenses is alien to our notions of criminal justice or unconstitutional is discussed on pp. 36-37, *supra*.

365 So.2d 985, 1001 (Ala. Cr. App.), aff'd, 365 So.2d 1006 (Ala. 1978) (A. 43); *Evans v. Britton*, 472 F. Supp. at 718. After a jury returns a verdict convicting a defendant of a capital offense, its role ends. The guilt stage is over and the sentencing stage begins.

Section 13-11-3 requires that a sentence hearing be held for every defendant convicted of a capital offense. At the sentence hearing, "an experienced trial court judge must consider the particularized circumstances surrounding the offense and the offender and determine if the accused is to die or be sentenced to life imprisonment without parole." *Mack v. State*, 375 So.2d 476, 500-501 (Ala. Cr. App. 1978), *aff'd* 375 So.2d 504 (Ala. 1979). In making the sentence determination, the trial judge must consider the aggravating and mitigating factors set out in sections 13-11-6 and 13-11-7. Except for a minor difference, they are identical to the statutory aggravating and mitigating circumstances in the statute upheld in *Proffitt v. Florida*, 428 U.S. at 248 n. 6.[32]

Unlike the statute struck down in *Lockett v. Ohio*, 438 U.S. 586 (1978), the Alabama statute does not limit the sentencing authority's consideration of mitigating circumstances to those enumerated in the statute. Instead, section 13-11-3 provides that, "evidence may be presented as to any matter the court deems relevant to sentence," and the Alabama courts have repeatedly held that the statute provides for consideration of non-statutory mitigating circumstances. *E.g., Cook v. State*, 369 So.2d 1251, 1256 (Ala. 1979); *Jacobs v. State*, 361 So.2d 640, 652-654 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979); *see also, Evans v. State*, 361 So.2d 654, 664 (Ala. Cr. App. 1977), *aff'd*, 361 So.2d 666 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979).

Because preclusion does not mean that every defendant convicted of a capital offense is sentenced to death, and because it does not prevent the trial court judge as

[32]The only difference is that the Alabama statute's fourth aggravating circumstance omits the crimes of arson, aircraft piracy, and bombing from the list of felonies it contains.

sentencing authority from considering the character and record of the individual defendant and the circumstances of the particular capital offense, preclusion is not contrary to *Lockett, Woodson*, or the *Roberts* decisions.[33]

B. Preclusion Does Not Undermine the Reliability of Sentencing Under Alabama's Statute

Attempting to convert what is essentially a due process issue into an Eighth Amendment claim, petitioner argues that the preclusion of lesser included non-capital offenses jeopardizes the reliability of the sentencing decision in a capital case under Alabama's statute. Petitioner's argument is premised upon his assertion that the jury's guilty verdict requires the judge in making the sentence determination to find at least one aggravating circumstance. See pp. 16, 18, and 53 of petitioner's brief. That assertion is wrong.

It is true that the definitions of capital offenses contained in section 13-11-2(a) substantially overlap with the enumeration of aggravating circumstances set out in section 13-11-6. It is also true that the same evidence which convinces the jury beyond a reasonable doubt of the defendant's guilt of the capital offense will usually also

[33]Even if the Alabama statute be perceived as a mandatory one from the jury's perspective, see p. 22, n. 11, *supra*, it has not simply "papered over the problems of unguided and unchecked jury discretion" as had the statutes in *Woodson v. North Carolina*, 428 U.S. at 302-303 (plurality opinion), and *Roberts (Stanislaus) v. Louisiana*, 428 U.S. at 334-335 (plurality opinion). The concern was that those statutes would lead to arbitrary and capricious sentencing results because it was predicted that some juries would convict guilty capital defendants only of lesser included non-capital offenses or would acquit them outright. *Woodson v. North Carolina*, 428 U.S. at 302-303 (plurality opinion); *id* at 314 (Rehnquist, J., dissenting). Alabama's statute forecloses that first possibility by precluding lesser included offenses. The second possibility, wrongful acquittal to avoid what appears to be a mandatory death penalty, is removed by the fact that the statute limits capital offenses to a narrowly defined group of the most brutal crimes and by the fact that the jury has available the mistrial option. See pp. 22-24, *supra*. In any event, the conviction statistics cited on p. 24 of petitioner's brief evidence that there has been no jury nullification in the operation of Alabama's statute.

convince the trial court judge of the existence of at least one aggravating circumstance which the judge will consider along with other aggravating and mitigating circumstances in making the sentence determination. But the judge is not bound by any fact-finding implicit in the jury's verdict, as a recent case makes clear.

The defendant in *Phillip Wayne Tomlin v. State*, 1 Div. 23 (Ala. Cr. App., Nov. 20, 1979),[34] was prosecuted for a capital offense under a three-count indictment. Two of the counts alleged the capital offense of section 13-11-2(a)(10) [first degree murder of two or more victims] and one count alleged it as a violation of section 13-11-2(a)(7) [first degree murder for pecuniary gain]. Slip op. at 3-6. The trial court denied the defendant's timely motion to exclude the state's evidence relating to the pecuniary gain count, which is the Alabama procedural device for directing a verdict in favor of the defendant on that count. Slip op. at 6. However, after the jury had convicted the defendant, the trial court specifically found in making its sentence determination that the defendant did not commit the capital offense for pecuniary gain, and that the aggravating circumstance enumerated in section 13-11-6(6) accordingly did not apply. Slip op. at 6. On appeal, the defendant attacked the apparent inconsistency of the trial court's actions but the Court of Criminal Appeals affirmed, noting that "[t]his seemingly anomalous result is peculiar to the death penalty statute . . ." Slip op. at 8.

The Court of Criminal Appeals explained that a basic legislative concern was to keep the sentence hearing separate and apart from the trial itself, and to stop jury input at the guilt stage. Slip op. at 8. The trial court at the sentence hearing is "allowed substantive and procedural flexibility which is generally prohibited during the jury trial," slip op. at 8-9, and it is not bound to follow any fact-finding of the jury. As the Court of Criminal Appeals

[34]The *Tomlin* opinion has not yet been published. Copies of it in manuscript form have been furnished to the Clerk for the Court's convenience and to opposing counsel.

concluded:

> "Thus, it is a natural consequence that the trial court having at hand not only the benefit of facts garnered at the trial, but also the 'relevant' and 'probative' matters gleaned at the sentence hearing, may make findings of fact seemingly at odds with the prior jury determination. Nonetheless, unless a clear abuse of discretion is shown, the trial court's findings of fact will be upheld." Slip op. at 9.

The jury's verdict of guilt thus does not require that the trial court find the existence of any aggravating circumstance, because the trial court is not bound by any fact-finding implicit in the jury's verdict. The separation of the trial court's fact-finding from the jury's fact-finding operates as a safeguard to ensure that only those who are guilty of a capital offense will receive the death penalty. See pp. 25-27, *supra*.

Another safeguard which ensures the fairness and reliability of capital sentencing decisions under Alabama's statute is appellate review of sentencing. Section 13-11-5 provides that a sentence of death as well as the conviction on which it is based is subject to appellate review, and Alabama's courts have repeatedly interpreted the statute as providing for appellate review of a trial court's decision to impose the death penalty. *E.g., Beck v. State*, 365 So.2d 985, 1000, 1005 (Ala. Cr. App.), *aff'd*, 365 So.2d 1006 (Ala. 1978) (A. 40-41); *Clements v. State*, 370 So.2d 708, 712-713 (Ala. Cr. App. 1978), *rev'd on other grounds*, 370 So.2d 723 (Ala. 1979); *Jacobs v. State*, 361 So.2d 607, 632-633 (Ala. Cr. App. 1977), *aff'd*, 361 So.2d 640, 644 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979); *Neal v. State*, 372 So.2d 1331, 1347 (Ala. Cr. App.) (concurring opinion of Bowen, J.), *cert. denied*, 372 So.2d 1348 (Ala. 1979); *see, Thomas v. State*, 373 So.2d 1149, 1160 (Ala. Cr. App.), *aff'd*, 373 So.2d 1167 (1979); *Evans v. State*, 361 So.2d 654, 662 (Ala. Cr. App. 1977), *aff'd*, 361 So.2d 666, 667 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979).

As the Court of Criminal Appeals explained in reviewing petitioner's case, "the evidence of aggravating and mitigating circumstances is reviewed and re-weighed not only by the Court of Criminal Appeals of Alabama, but by the Supreme Court of Alabama." *Beck v. State*, 365 So.2d at 1000 (A. 40). This appellate review ensures that capital sentencing decisions will be factually sound. It also ensures consistency and prevents arbitrariness and capriciousness in sentencing. *Gregg v. Georgia*, 428 U.S. at 198, 204-207 (joint opinion); *id.*, at 211-212, 222-224 (concurring opinion of White, J., joined by Burger, C.J., and Rehnquist, J.); *Proffitt v. Florida*, 428 U.S. at 251, 259 (joint opinion).

C. Preclusion Does Not Cause Disproportionate Sentences

Petitioner's argument that preclusion will cause excessive sentences in capital cases is based upon his general assumption that preclusion undermines the proof beyond a reasonable doubt standard, jeopardizes the reliability of fact-finding at the guilt stage, and causes juries to convict defendants of capital offenses when they are actually only guilty of non-capital lesser included offenses. That speculative assumption is unfounded and should be rejected for the reasons discussed on pp. 17-33, *supra*.

Petitioner's argument that preclusion will cause disproportionate sentences in capital cases also ignores the separation of the sentencing determination from the guilt determination, see pp. 25-27, *supra*. In making its sentence decision, the trial court is required to consider objective factors designed to ensure that the sentence is not disproportionate to the crime. For example, it considers such factors as whether the defendant was mentally or emotionally disturbed, section 13-11-7(2), whether the defendant's mental capacity was impaired even if he was not insane, section 13-11-7(6), and whether he was an

accomplice whose participation in the capital felony was relatively minor compared to that of others, section 13-11-7(4).[35] The latter section was cited with approval in *Lockett v. Ohio*, 438 U.S. at 616-617 n. 3 (Blackmun, J., concurring). See also, p. 26, *supra*.

Petitioner's argument also ignores the fact that Alabama provides appellate review of sentencing decisions. See pp. 59-60, *supra*. For example, in the present case, the Court of Criminal Appeals said:

> "We have also considered the mitigating and aggravating circumstances and have found that under the facts of this case, death was the appropriate penalty.
>
> "The facts in this case, after a careful evaluation, show a marked similarity with those in *Jacobs v. State*, supra.
>
> "It seems to us that the result is inescapable that the punishment, too, should be the same." *Beck v. State*, 365 So.2d at 1005 (A. 50).

Comparative appellate review of capital sentences ensures

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[35]Contrary to the implication on p 13 of petitioner's brief, there is no indication that the trial court judge failed to consider in determining sentence whether petitioner was an accomplice whose participation in the capital felony was relatively minor compared to that of his partner in crime, Roy Frank Clements. The fact that the judge did not list that mitigating factor in his sentence findings (A. 34, R. 812-813), simply indicates that he concluded petitioner was not an accomplice whose participation was relatively minor, and that conclusion is well supported by the facts. Petitioner, who is twelve years older than Clements (R. 608-609), drove the vehicle which transported them to and from the murder (A. 23), and it was petitioner who disposed of the victims' wallet and purse afterwards (A. 23, R. 483-484, R. 601-602). Petitioner was the one who was sharpening his knife before the crime (R. 385-388), the one who admitted jumping onto the victim and holding him down while his throat was cut (A. 23, 57, 59-60), and the one who said "We did it" afterwards (R. 481-482, 496-497, 584). It was petitioner whose clothes were so bloodstained after his grisly participation (R. 395, 397, 458, 466, 468, 507, 598-599) that he had to burn them (A. 23, R. 392-394, 483).

consistency and fairness in sentencing. *Gregg v. Georgia*, 428 U.S. at 198, 204-207 (joint opinion); *Proffit v. Florida*, 428 U.S. at 251, 259 (joint opinion), and the independent weighing of aggravating and mitigating circumstances at the appellate level ensures that sentences will not be disproportionate to the crime. On appeal to the Alabama Supreme Court, petitioner did not contest the Court of Criminal Appeals' holding that death was the proper penalty under the facts in this case, and he should not be heard to do so here.

Petitioner's contention that the Alabama statute permits the death penalty to be imposed based on fortuitous events that do not distinguish the moral culpability of defendants has no basis in the facts of this case in particular, see p. 61, n. 35 *supra*, and in general is rebutted by the individualized sentencing and appellate review procedures. See, pp. 25-26, and 57-60, *supra*.

Petitioner also argues on pp. 58-60 of his brief that he was convicted without a "clear cut" finding that he intended to kill the victim. Insofar as that is a complaint about the Alabama statute, it is unjustified because the Alabama Supreme Court has interpreted the statute to require that the defendant either have a particularized intent to kill or be an accomplice to the intentional killing itself. *Ritter v. State*, 375 So.2d at 270, 274-275 (Ala. 1979). Because the felony murder doctrine cannot be used to supply that intent, *Ritter v. State*, 375 So.2d at 273-274, it is not enough that a defendant was involved in the underlying felony which led to the killing. The requirement that the defendant be an accomplice to the intentional killing itself is best explained in light of the facts in *Ritter* where the requirement was held to be met.

The appellant in *Ritter* was a principal to the robbery, but the victim was killed by his co-defendant. 375 So.2d at 274-275. Although Ritter was not the triggerman, the possibility that someone might have to be killed was discussed beforehand and planned for. *Id.* at 275. He and his co-defendant had an agreement that they would kill any

one who attempted to go for a gun, and the only reason that Ritter did not himself kill the victim was that his co-defendant was in his line of fire. *Id.* The Alabama Supreme Court held that those facts justified the conclusion that Ritter was an accomplice to the intentional killing itself. *Id.*

A finding that a defendant either had a particularized intent to kill or was an accomplice to the intentional killing itself means that he can be convicted of a capital offense under the statute, but that does not necessarily end the matter in Alabama. The Alabama Supreme Court indicated in *Ritter* that in any case in which an appellant argued that the death penalty was disproportionate as applied to him because he did not fire the shot or strike the blow that killed the victim, that court would itself review the particular facts involved to determine whether the death penalty was disproportionate as a constitutional matter.[36] 375 So.2d at 275. *See also, Code of Alabama* 1975, §13-11-7(4); *Lockett v. Ohio*, 438 U.S. at 613-617 (Blackmun, J., concurring); *id.* at 635-636 (Rehnquist, J., dissenting).

To the extent that petitioner's intent-to-kill argument refers to the petitioner's own case, then it is an issue not presented for review. The complaint which petitioner makes on p. 58 n. 49 of his brief, arguing that "the trial judge gave the jury an aider-and-abetter and conspiracy instruction which did not focus clearly on the necessity for the jury to find that petitioner had the requisite intent to kill," was not made to the Alabama appellate courts. Petitioner did not raise before the Alabama Court of Criminal Appeals or the Alabama Supreme Court any intent to kill or disproportionality issues. For that reason, this Court need not, should not, and jurisdictionally cannot decide them. See, the cases cited on pp. 43-44, *supra*. In addition, no intent to kill or disproportionality issue is included in the certiorari order in this case (A. 63).

[36]Petitioner did not make that argument to the Alabama Supreme Court (A. 53) or the Court of Criminal Appeals.

D. Neither Preclusion Nor Any Other Factor Has Resulted in an Improperly High Percentage of Death Sentences For Convictions Under Alabama's Statute

The sentencing statistics referred to on pp. 24 and 56-57 of petitioner's brief do not establish that preclusion or any other factor has resulted in an improperly high death sentence rate under Alabama's statute because they do not establish that the rate is too high. The 82% death sentence rate which petitioner cites excludes convictions based on guilty pleas. If capital convictions based on guilty pleas are included, the rate is 67%.[37] Since prosecutors are more likely to plea bargain when the circumstances of the offense and offender are more deserving of a sentence less than death, excluding guilty pleas presents an incomplete picture.

In addition, the 82% death sentence rate includes three cases in which death sentences have since been changed to life imprisonment without parole following new sentence hearings which occurred after that data was compiled.[38] If

[37]Petitioner's statistics are drawn from Respondent's Brief in Opposition to a Petition for a Writ of Certiorari, Jacobs v. Alabama (U.S. October Term, 1978, No. 78-5696) at 10, 35, which shows that as of that time 37 convicted capital defendants had been sentenced to death and 8 had been sentenced to life imprisonment without parole after having been convicted of a capital offense following a plea of not guilty. Pages 2, 9, 10, 12, and 14 of the appendix of that brief also show that as of that time an additional 10 defendants had been sentenced to life imprisonment without parole after having been convicted of a capital offense following a guilty plea. Therefore, 45 + 10 = 55, and 37 ÷ 55 = 67%.

[38]The three cases are: 1) State v. Woodrow Wilson Keller, Jacobs Brief, *supra*, appendix at 12, which was reversed and remanded for a new sentence hearing in *Woodrow Wilson Keller v. State*, 4 Div. 629 (Ala. Cr. App. Feb. 20, 1979), and in which the new sentence of life without parole was noted in *id.* (Ala. Cr. App. Oct. 16, 1979) (after remand); 2) State v. Recardo Cook, Jacobs Brief, *supra*, appendix at 3, which was reversed and remanded for a new sentence hearing in *Cook v. State*, 369 So.2d 1251 (Ala. 1979), and in which a sentence of life without parole was entered on July 2, 1979 (Jefferson County Circuit Court Case No. CC 76-01153); 3) State v. Tommy Lewis, Jacobs Brief, *supra*, appendix at 6, which was reversed and remanded for a new sentence hearing in *Tommy Lewis v. State*, 4 Div. 611 (Ala. Cr. App. Sep. 4, 1979), and in which a sentence of life without parole was entered on November 13, 1979 (Coffee County Circuit Court Case No. CC 77-25).

those three are treated as life without parole cases as they should be since that was the sentence ultimately imposed, then the death sentence rate is 76% if guilty pleas are excluded,[39] or 62% if guilty pleas are included.[40] Therefore, depending upon the data referred to, somewhere between 18% and 38% of an initial group of those convicted of capital offenses under Alabama's statute have received sentences of life imprisonment without parole.

Regardless of whether the death sentence rate is considered to be 62% or 82%, or somewhere in between, the statistics do not establish that preclusion or any other factor has resulted in too high a rate of death sentence imposition under Alabama's statute. Petitioner has offered no evidence whatsoever that any defendant has been sentenced to death under Alabama's statute for any reason other than the fact that death was determined to be the proper sentence by a trial court judge applying objective standards as the sentencing authority.

On pp. 56-57 of his brief, petitioner refers to "historic norms" and cites *Woodson v. North Carolina*, 428 U.S. at 295, n. 31, for the proposition that in the pre-*Furman* era juries exercising unbridled discretion generally sentenced less than 20% of convicted capital murder defendants to death. That figure is inapposite to the present case for two reasons. First of all, the sources referred to in the footnote cited from *Woodson* make it clear that the rate referred to is the rate of death sentences for all those convicted of any kind of murder which was defined as capital in the pre-*Furman* era. Alabama's new capital punishment statute limits the definition of capital offenses to a group of narrowly defined types of aggravated murder, section 13-11-2(a), the very crimes which are most deserving of the death penalty. For example, in the pre-*Furman* era, Alabama law provided death as a discretionary punishment for all first degree murders, including

[39]37 - 3 = 34, and 34 ÷ 45 = 76%.

[40]See n. 37, *supra*. 37 - 3 = 34, and 45 + 10 = 55, 34 ÷ 55 = 62%.

domestic homicides and homicides which were first degree murder by virtue of the felony murder doctrine. Title 14, §§314 and 318, *Code of Alabama* 1940 (Recompiled 1958). Under the post-*Furman* Alabama statute involved in this case neither domestic homicides nor homicides which are first degree murder by virtue of the felony murder rule are defined as capital. *Code of Alabama* 1975, §13-11-2(a) and (b). Mr. Justice White has observed that:

> "As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate . . . it becomes reasonable to expect that [the sentencing authority] — even given discretion not to impose the death penalty — will impose the death penalty in a substantial portion of the cases so defined. If [the sentencing authority] do[es], it can no longer be said that the penalty is being imposed so wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device. . . ." *Gregg v. Georgia*, 428 U.S. at 222 (concurring opinion of White, J., joined by Burger, C.J., and Rehnquist, J.).

Not only does Alabama's new statute define capital offenses more narrowly than the pre-*Furman* Alabama statute, it also defines them more narrowly than the post-*Furman* statutes of several other states.[41]

The second reason why the "historic norm" provided by pre-*Furman* sentencing is not an appropriate standard by which to judge Alabama's statute is because that sentencing "norm" was the very thing which resulted in the

[41]For example, the statutes upheld in *Profitt v. Florida*, 428 U.S. at 247, n. 4, and *Gregg v. Georgia*, 428 U.S. at 162, n. 4, define all first degree murders, including domestic homicides and homicides which constitute first degree murder solely because of the felony murder doctrine, as capital offenses. The more limited scope of Alabama's capital punishment statute is illustrated by the fact that the crimes involved in *Dobbert v. Florida*, 432 U.S. 282 (1977), and *Gardner v. Florida*, 430 U.S. 349 (1977), could not have been prosecuted as capital offenses in Alabama. See section 13-11-2(a).

Furman decision. The pre-*Furman* "norm" which petitioner would have Alabama strive for was judged to be "pregnant with discrimination," *Furman v. Georgia*, 408 U.S. at 257 (Douglas, J., concurring), caused capital punishment to be "wantonly" and "freakishly" imposed, *id.* at 310 (Stewart, J., concurring), and resulted in the death penalty being imposed with such "great infrequency" that there was "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not," *id.* at 313 (White, J., concurring). *Accord*, *id.* at 293, 305 (Brennan, J., concurring); *Gregg v. Georgia*, 428 U.S. at 188 (joint opinion). Alabama makes no apologies for not measuring up to that "norm."

E. The Fact That Other States Do Not Preclude Lesser Included Non-Capital Offenses Does Not Mean That Preclusion Violates The Cruel and Unusual Punishments Clause

In holding that the Cruel and Unusual Punishments Clause of the Eighth Amendment was violated by imposition of the death penalty for rape of an adult woman, the plurality in *Coker v. Georgia*, 433 U.S. 584, 595-596 (1977), noted that Georgia was the only state authorizing capital punishment for that crime. It does not follow from *Coker* that the clause is violated whenever a state uses a procedure in capital punishment cases which is different from all other states. *Coker* involved the quantum of punishment, not procedure. The issue of whether a punishment is excessive in relation to a particular crime was held to be within the scope of the Cruel and Unusual Punishments Clause, *Coker v. Georgia*, 433 U.S. at 592 (plurality opinion), but the death penalty is not an excessive punishment for petitioner's crime of first degree murder during the course of a robbery. *Id.* at 598 ("Rape . . . does not compare with murder, which does involve the unjustified taking of human life.")

Woodson v. North Carolina, 428 U.S. 280 (1976), does not

stand for the proposition that the Eighth Amendment mandates uniformity of procedure in capital cases. It was not so much a procedure that was held unconstitutional in *Woodson* as it was an underlying judgment that death could be the proper sentence for all defendants convicted of specified capital offenses regardless of individualized circumstances concerning the offense and offender. *See Woodson v. North Carolina*, 428 U.S. at 292-298, 301, 303-304 (plurality opinion); *Lockett v. Ohio*, 438 U.S. at 601 (plurality opinion). The preclusion of lesser included offenses does not embody such a judgment, and the Alabama statute provides for individualized sentencing and consideration of all the relevant circumstances concerning the offense and offender. See pp. 25-26, *supra*.[42]

The plurality opinions in *Woodson* and *Coker*, did consider "contemporary community values" and "evolving standards of decency," but consideration of such factors does not compel the conclusion that preclusion, like mandatory death penalty provisions or capital punishment for rape, is contrary to the Cruel and Unusual Punishments Clause. In both *Woodson v. North Carolina*, 428 U.S. at 295, and *Coker v. Georgia*, 433 U.S. at 596, the plurality relied upon the jury as "a significant and reliable objective index of contemporary values," *id.* at 596, *quoting Gregg v. Georgia*, 428 U.S. at 181; *accord, Furman v. Georgia*, 408 U.S. at 440-441 (Powell, J., dissenting) (noting that any attempt to discern the prevailing standards of decency must consider the response of juries); *Witherspoon v. Illinois*, 391 U.S. 510, 519-520 & n. 15 (1968) (juries "express the conscience of the community" and their actions reflect "contemporary community values"). The only contemporary data concerning whether juries reject preclusion is what petitioner refers to on p. 24 of his brief as the "astonishing" 96% conviction rate under Alabama's

[42]Unlike mandatory death penalty statutes, the preclusion of lesser included non-capital offenses has not simply "papered over" the problems of unguided and unchecked jury discretion. See p. 57 n. 33, *supra*.

statute. That statistic certainly does not indicate that juries expressing the conscience of the community and reflecting prevailing standards of decency have rejected preclusion.

Nor do history and traditional usage compel the conclusion that preclusion of lesser included non-capital offenses violates the Cruel and Unusual Punishments Clause. History shows that lesser included offenses were designed and developed to assist the prosecution when the evidence at trial failed to establish some element of the offense charged, *e.g., Keeble v. United States*, 412 U.S. 205, 208 (1973); *Kelly v. United States*, 370 F.2d 227 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 913 (1967); *United States v. Markis*, 352 F.2d 860, 866 (2nd Cir. 1965), and traditional usage reflects no more than that fact. Even if traditional usage did reflect a general judgment that the availability of lesser included offenses was necessary as a procedural safeguard in other contexts and circumstances, the special situation under Alabama's capital punishment statute is different. See pp. 21-31, *supra*.

In judging the constitutionality of procedural devices in capital cases, this Court should not adopt an Eighth Amendment approach which focuses upon the singularity or lack of singularity of the procedure. To do so would divert attention from what should be the principal inquiry, would conscript the Cruel and Unusual Punishments Clause to a use for which it was not intended, would call into question the validity of statutes recently upheld by this Court, and would destroy the doctrine of federalism in this area of the law. The principal inquiry in judging the constitutionality of the preclusion of lesser included non-capital offenses should be whether or not it undermines the reasonable doubt standard and jeopardizes the reliability of fact-finding. That issue is fully addressed in petitioner's brief and in this one. See pp. 17-33, *supra*. If preclusion does undermine the reasonable doubt standard and jeopardize the reliability of fact-finding under Alabama's statute, that is a due process concern, and the Due Process

Clause is an adequate tool with which to handle it. If preclusion does not undermine the reasonable doubt standard and jeopardize the reliability of the fact-finding process, then there is no reason for holding preclusion to be offensive to the Eighth Amendment.

The Cruel and Unusual Punishments Clause was never intended to force procedural uniformity on the states in capital cases or any other kind of cases. *See, Furman v. Georgia*, 408 U.S. at 317-321, 322 (Marshall, J., concurring) ("Thus, the history of the clause establishes that it was intended to prohibit cruel punishments."); *id.* at 242-245 (Douglas, J., concurring); *id* at 376-379 (Burger, J., dissenting). Those who would use it for that purpose would have this Court enact what would amount to a uniform code of procedure for capital cases. Under such a regime, states could safely change their procedure, if at all, only by acting in unison.

If this Court holds that procedural singularity is per se bad, that holding would raise serious questions about the validity of a large number of capital punishment statutes, including some which this Court has recently upheld. For example, Texas uses an unusual three-question procedure to determine sentencing in capital cases, *Jurek v. Texas*, 428 U.S. 262, 269 (1976). Would the singularity of that procedure compel a re-examination of the holding in *Jurek?* Georgia provides that if the jury is unable to agree on punishment, a sentence less than death must be imposed. *Gregg v. Georgia*, 428 U.S. at 208 n. 2. If it is determined that most other states provide for a declaration of mistrial and the empaneling of a new sentencing jury, would that mean Georgia's different rule is constitutionally offensive? Florida provides that the jury's advisory verdict on sentencing is determined by majority vote, *Proffitt v. Florida*, 428 U.S. at 248-249. Is the Florida statute doomed if other states have different requirements? *See generally, Jurek v. Texas*, 428 U.S. at 269, n. 5.

This Court held in *Addington v. Texas*, 99 S. Ct. 1804,

1812 (1979), that federalism requires that states not be forced into a common procedural mold. *Addington* was a case which applied the Due Process Clause, but the same holding has been reached in an Eighth Amendment case. *Gregg v. Georgia*, 428 U.S. at 195 (plurality opinion), declared that procedural uniformity was not required in capital punishment cases and that "each distinct system must be examined on an individual basis." If federalism is to have any meaning, this Court should not depart from that rule and should not hold that procedural singularity is constitutionally offensive. Instead, this Court should examine Alabama's statute, including its preclusion of lesser included non-capital offenses, on an individual basis.

VII.

THE RESULT OF FURMAN AND ITS PROGENY DEMONSTRATE THAT THIS COURT SHOULD GIVE FULL WEIGHT TO PRINCIPLES OF JUDICIAL RESTRAINT IN THIS CASE

The issue before this Court is not whether the preclusion of lesser included non-capital offenses by a capital punishment statute is the best or wisest procedure for a state to follow. Instead, the issue is whether such preclusion violates the Constitution. That distinction is mandated by principles of judicial restraint. It is sometimes difficult to apply the doctrine of judicial restraint in capital cases, but the confusion and uncertainty which have existed in the post-*Furman* era demonstrate the wisdom of it.

Members of the Court have on many occasions lectured themselves and their colleagues on the need for judicial restraint in exercising the vast powers of the Court. As Mr. Justice Powell has stated:

> "Throughout our history, Justices of this Court have emphasized the gravity of decisions invalidating legislative judgments, admonishing the nine men who

> sit on this bench of the duty of self-restraint, especially when called upon to apply the expansive due process and cruel and unusual punishment rubrics." *Furman v. Georgia*, 408 U.S. at 418 (dissenting opinion).

The importance of judicial restraint has been stressed time and time again. Mr. Justice Holmes said that reviewing the constitutionality of legislation is, "the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 147-148 (1927) (concurring opinion). Mr. Justice Frankfurter thought judicial restraint so important that he said it was "of the essence in the observance of the judicial oath." *Trop v. Dulles*, 356 U.S. 86, 119-120 (1958) (dissenting opinion). And Mr. Chief Justice Burger has stated that, "[t]he highest judicial duty is to recognize the limits on judicial power and to permit the democratic processes to deal with matters outside those limits." *Furman v. Georgia*, 408 U.S. at 405 (dissenting opinion).

In matters of challenged procedure, judicial restraint mandates that the Court be mindful that the United States Constitution "does not guarantee trial procedures that . . . measure up to the predilections of members of this Court." *McGautha v. California*, 402 U.S. 183, 221 (1971); *accord, Gregg v. Georgia*, 428 U.S. at 175 (plurality opinion) ("we may not act as judges as we might as legislators."). Mr. Justice Blackmun has described both the necessity and the difficulty of applying principles of judicial restraint in capital cases:

> "Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible." *Furman v. Georgia*, 408 U.S. at 411 (dissenting opinion).

Therein lies the difficulty. Mr. Justice Jackson once recognized that in death penalty cases the Court is tempted to strain the evidence and even the law to spare a defendant's life. *Stein v. New York*, 346 U.S. 156, 196 (1953) (majority opinion). To recognize that tendency is not to legitimatize it. The experience with *Furman* and its progeny demonstrate that judicial restraint is especially needed in capital cases.

Furman came suddenly and "changed abruptly," and in a way never intimated before, the constitutional law applicable to capital punishment. *Lockett v. Ohio*, 438 U.S. at 598 (plurality opinion). What had been specifically approved under the Due Process Clause in *McGautha* was struck down under the Eighth and Fourteenth Amendments only a year later in *Furman*. *Lockett v. Ohio*, 438 U.S. at 599 (plurality opinion). If, as Mr. Chief Justice Burger suggested, such a "pattern of decision-making will do little to inspire confidence in the stability of the law," *Furman v. Georgia*, 408 U.S. at 400 (dissenting opinion), then post-*Furman* developments have done even less.

Part of the uncertainty in the post-*Furman* era stems from the nature of that decision and the opinions supporting it. As the *Lockett* plurality noted, "Predictably, the variety of the opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." *Lockett v. Ohio*, 438 U.S. at 599 (footnotes omitted); *accord, Furman v. Georgia*, 408 U.S. at 461 (Powell, J., dissenting) (referring to "the cloudily outlined views" of three Justices whose views were essential to that opinion); *Woodson v. North Carolina*, 428 U.S. at 317 (Rehnquist, J., dissenting) (remarking that for state legislatures to respond to the concerns of *Furman* was "not an easy task considering the glossolalial manner in which those concerns were expressed"). But the *Furman*

decision has not been the only source of difficulty. The *Lockett* plurality acknowledged that, "[t]he signals of this Court have not, however, always been easy to decipher." *Lockett v. Ohio*, 438 U.S. at 602. Mr. Justice Rehnquist expressed it another way when he said:

> "as I believe both the opinion of the Chief Justice and the opinion of my Brother White seem to concede, the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed." *Lockett v. Ohio*, 438 U.S. at 629 (dissenting opinion).

Accord, id. at 622-623 (White, J., concurring) ("The Court has now completed its about-face since *Furman*"). State legislatures and courts have tried mightily to comply with the dictates of this Court's capital punishment decisions, but it is difficult to hit a moving target.[43]

Stare decisis and the predictability and stability of the law have not been the only values sacrificed by the decisions striking down capital punishment statutes. The supreme irony is that *Furman* and its progeny have, in actual operation, sacrificed those very values that they held so constitutionally important. There has been no greater source of arbitrariness and capriciousness in the post-*Furman* era than the uncertainty and unpredictability of the law. At least 39 states and the District of Columbia had their capital statutes invalidated by *Furman*. *Furman v. Georgia*, 408 U.S. at 385 (Burger, C.J., dissenting); *id.* at 417 (Powell, J., dissenting). When that happened, some 600 persons, *see*, 408 U.S. at 417 (Powell, J., dissenting), escaped capital punishment

[43]No better example of that difficulty can be found than in *Lockett*, where the plurality noted that what it was holding to be constitutionally required in that decision "reasonably would have appeared to be [of] questionable constitutionality" under *Furman*. *Lockett v. Ohio*, 438 U.S. at 599-600 n. 7. Indeed, Ohio was in the process of enacting exactly what *Lockett* would later require when *Furman* was released and caused the Ohio Legislature to change its mind. *Id.*

simply because the states had understandably not predicted *Furman*. Within four years after *Furman*, 35 states had re-enacted capital punishment statutes, *Gregg v. Georgia*, 428 U.S. at 179 (plurality opinion), but no fewer than 10 of them were invalidated by the *Woodson* and *Roberts* decisions because the legislatures in those states adopted mandatory statutes, *see, Woodson v. North Carolina*, 428 U.S. at 313 (Rehnquist, J., dissenting), something they thought *Furman* required. *Id.* at 298-299 (plurality opinion); *see generally, Furman v. Georgia*, 408 U.S. at 413 (Blackmun, J., dissenting). Hundreds of persons convicted of capital offenses escaped the death penalty because of that development. Another post-*Furman* statute was struck down in *Lockett*, again because a state legislature understandably failed to anticipate what would be held to be constitutionally required, see p. 74 n. 43, *supra*, and accordingly its death row was emptied.

The net result is that only one person has been executed against his will in the seven and a half years since *Furman*, and literally hundreds have escaped execution because of the uncertainty and confusion about what the Constitution requires. This resulting situation seems even more arbitrary and capricious than the one that *Furman* was intended to remedy. *See, Woodson v. North Carolina*, 428 U.S. at 309 (Rehnquist, J., dissenting) ("a result surely as 'freakish' as that condemned in the separate opinions in Furman"); *see generally, Furman v. Georgia*, 408 U.S. at 291 & n. 40 (concurring opinion of Brennan, J.); *id.* at 434 n. 18 (dissenting opinion of Powell, J.). It also contradicts the principle that capital punishment should not be imposed with such "great infrequency" that there is "no meaningful basis for distinguishing the many cases in which it is imposed from the few cases in which it is not." *Furman v. Georgia*, 408 U.S. at 313 (White, J., concurring); *Gregg v. Georgia*, 428 U.S. at 188 (joint opinion); *see Furman v. Georgia*, 408 U.S. at 293 (Brennan, J., concurring) ("Indeed, it smacks of little more than a lottery system.").

The purpose of this discussion is not to suggest that this Court does not have the responsibility for determining the constitutionality of the preclusion of lesser included non-capital offenses under Alabama's statute. Certainly it does. Nor is it to suggest that the statute's preclusion clause should not be struck down if this Court determines that that clause violates the Constitution. Certainly it should be. Instead, the purpose of the discussion is to suggest respectfully that in deciding the constitutional issues which are raised by preclusion, this Court should give full weight to the principles of judicial restraint, and should consider the de facto arbitrariness and capriciousness which results whenever a capital punishment statute is struck down. The purpose of the discussion is also to suggest respectfully that while striking down a capital punishment statute is always "the easy choice," *Furman v. Georgia*, 408 U.S. at 410 (Blackmun, J., dissenting), it is not always the proper one.

VIII.

THE PRECLUSION ISSUE SET OUT IN THE CERTIORARI ORDER IS PRESENTED IN THIS CASE, BUT CERTAIN OTHER ISSUES ARE NOT

The question to be considered in this case is limited in two important ways by the order granting certiorari (A. 63). First, whether petitioner's conviction itself is to be reversed if preclusion is held to be constitutionally impermissible should not be considered, because the order limits the question to whether the sentence of death may be imposed under the posited circumstances. Relying upon that limitation, Alabama has not addressed in this brief the issue of whether, assuming that the death penalty cannot be imposed, Alabama could constitutionally re-sentence petitioner to a punishment less than death without

retrying him.[44]

The second limitation is that the certiorari order posits that there was some evidentiary theory upon which a lesser included offense verdict could have been based. The possibility of a different rule for cases in which there is no evidentiary basis whatsoever for a lesser included non-capital offense verdict should not be foreclosed in this case. That limitation of the inquiry is in keeping with the well-established rule that juries should not be instructed on a lesser included offense if there is no basis in the evidence to support a conviction for the lesser included offense instead of for the higher offense. *E.g., Sansome v. United States*, 380 U.S. 343, 350 (1965); *Berra v. United States*, 351 U.S. 131 (1956); *Fulgham v. State*, 291 Ala. 71, 277 So.2d 886, 890 (1973); *Kelly v. State*, 235 Ala. 5, 176 So. 807, 808-809 (1937); *Golston v. State*, 57 Ala. App. 623, 330 So.2d 446, 449-450 (1975). It is also in keeping with this Court's implicit holding in *Gregg v. Georgia*, 428 U.S. 153 (1976), that the Constitution does not require that the jury be permitted to convict a capital defendant of a lesser included non-capital offense if there is no evidence at all to support a conviction on that lesser included offense.[45]

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[44]Petitioner recognizes that the Court's decision need only address the validity of the death sentence by noting on p. 34 of his brief that capital cases differ from non-capital cases, "because of the life-or-death choice at stake, and because of the grave public interest in avoiding an erroneous and irrevocable capital conviction and execution." In *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 336 (1976), and *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 638 (1977), the judgments of the state appellate courts were reversed only insofar as they upheld the death sentences in those cases. Mr. Justice White stated in *Gardner v. Florida*, 430 U.S. 349, 364 (concurring opinion), that "my conclusion is limited, as was *Woodson*, to cases in which the death penalty is imposed."

[45]Such a holding is implicit in *Gregg* because the Georgia statute which was upheld did not require lesser included non-capital offenses to be submitted to the jury unless a conviction for such offenses could be supported by some view of the evidence, *Gregg v. Georgia*, 428 U.S. at 163, and because this Court affirmed the conviction and sentence of death even though the trial judge had refused to instruct the jury in that case on the lesser included non-capital offense of manslaughter for which there was no evidentiary basis. 428 U.S. at 160, 161 n. 2, 215-216.

If this Court holds preclusion to be constitutionally impermissible under the facts of this case, it does not follow that every sentence of death imposed under Alabama's statute must be vacated. One case in which there was no evidence whatsoever to support an instruction on a lesser included non-capital offense is that of Wayne Eugene Ritter, which is reported as *Evans and Ritter v. State*, 361 So.2d 654 (Ala. Cr. App. 1977), *remanded*, 361 So.2d 666 (Ala. 1978), *aff'd after remand*, *Ritter v. State*, 375 So.2d 266 (Ala. Cr. App. 1977), *aff'd* 375 So.2d 270 (Ala. 1979). The *Ritter* case is currently pending before this Court on a petition for a writ of certiorari. Ritter v. Alabama (No. 79-5741).[46] In such cases, the jury would not have been permitted to convict the defendants of a lesser included offense even if Alabama's statute did not preclude lesser included non-capital offenses. *See, e.g., Fulgham v. State*, 291 Ala. 71, 277 So.2d 886, 890 (1973); *Kelly v. State*, 235 Ala. 5, 176 So. 807, 808-809 (1937); *Golston v. State*, 57 Ala. App. 623, 330 So.2d 446, 449-450 (1975); *see also, Sansome v. United States*, 380 U.S. 343, 350 (1965).

In the present case, if it had not been for the preclusion clause in Alabama's statute, lesser included offense instructions would have been given. The capital crime with

[46]The petitioner in *Ritter* repeatedly confessed and admitted all of the elements of the capital offense for which he was convicted. Against the objections of his attorneys, he entered a guilty plea at trial, took the stand and freely admitted he was guilty of the capital offense, and he asked to be executed. *Evans and Ritter v. State*, 361 So.2d at 655-661; *Ritter v. State*, 375 So.2d at 276. It is Alabama's position that even if the Court determines in the present case that a sentence of death cannot be imposed following preclusion of lesser included non-capital offenses if there was evidence to support an instruction on a lesser included non-capital offense, the death sentence in *Ritter* should not be reversed because there was absolutely no evidentiary dispute whatsoever about any element of the capital offense in that case. See Respondent's Brief in Opposition to Petition for Writ of Certiorari, Ritter v. Alabama (U.S. Oct. Term, 1979, No. 79-5741). The same is true of the death sentence imposed in the case of Ritter's co-defendant John Louis Evans, whose case is currently pending before the Fifth Circuit Court of Appeals in *Evans v. Britton*, 472 F. Supp. 707 (S.D. Ala. 1979), *appeal pending* (Fifth Circuit No. 79-2674).

which petitioner was charged is first degree murder during the course of a robbery. See p. 3 n. 2, *supra*. The two basic elements of that crime are robbery and first degree murder. There is an additional requirement concerning the defendant's intent or culpability for the killing. In *Ritter v. State*, 375 So.2d 270, 274-275 (Ala. 1979), the Alabama Supreme Court interpreted the statute as requiring either that the defendant have had the particularized intent to kill or have been an accomplice to the intentional killing itself. It is not enough that the defendant was a principal or accomplice to the underlying felony of robbery, but it is not required that he actually have done the killing himself. Instead, he is guilty of the capital offense if he sanctioned or facilitated the killing.

Because petitioner not only denied that he did the killing himself but also denied that he sanctioned or knowingly facilitated it, there was enough evidence, though just barely, to have supported lesser included non-capital offense instructions for the crimes of first degree murder and robbery had such instructions not been precluded by the statute. This conclusion does not mean that petitioner was not guilty of the capital offense, nor does it mean, as petitioner claims, that there was "strong evidence" that the petitioner was guilty of only a non-capital crime. Instead, that conclusion simply reflects the Alabama rule that when lesser included offenses are not precluded, the jury is to be instructed on them when there is "any evidence, however weak, insufficient, or doubtful in credibility" to support them. *Davis v. State*, 31 Ala. App. 508, 19 So.2d 356, 358 (1944), *aff'd*, 246 Ala. 101, 19 So.2d 358, 360 (Ala. 1944) ("unless there is an entire absence of evidence tending to show" that the defendant could have been guilty of the lesser offense instead of the greater one).[47]

[47]The evidentiary basis for the theory that petitioner was not guilty of the capital offense because he neither killed the victim nor sanctioned or facilitated the killing is certainly weak, insufficient, and doubtful in credibility. Petitioner's participation in the crime is described on p. 61 n. 35, *supra*. In addition, the most telling fact of all is that the victim knew

[footnote continued on next page]

While the evidence would have supported an instruction permitting the jury to convict the defendant of robbery and first degree murder, it would not have support an instruction on second degree murder as petitioner claims, because petitioner's own admissions and trial testimony established all of the elements of the higher offense of first degree murder.[48] Felony murder is one of the four types of first degree murder under *Code of Alabama*, §13-1-70. Petitioner did not deny any of the elements of felony murder at trial nor has he denied them before this Court. Page 22 of petitioner's brief refers to "petitioner's admitted participation in a serious non-capital crime (robbery) which, even petitioner acknowledged, culminated in the deadly knifing of the victim . . .". See also p. 72 of petitioner's brief where he admits that in order to establish felony murder the state need not prove that a defendant intended or contemplated the death of the victim, but merely that the defendant was guilty of a robbery and that a homicide occurred during the robbery.

[footnote continued from preceding page]
the petitioner and could identify him. Petitioner did not deny that fact and admitted as much when he testified that the victim had on an earlier occasion introduced some people to petitioner. (R. 586). Petitioner participated in the robbery knowing that the only way he could get away with it was for the victim to be killed. Contrast the facts in this case with *Lockett v. Ohio*, 438 U.S. 586, 590 (1978) ("Because she knew the owner, Lockett was not to be among those entering the pawnshop . . ."). The trial court properly instructed the jury that it could take into consideration any interest a witness might have, and could consider the petitioner's own self-serving testimony in light of his interest in the verdict. (A. 10).

[48]Since it is conceded that the jury would have been permitted to convict petitioner of the lesser non-capital offenses of robbery and first degree murder had the Alabama statute not precluded lesser included offenses, it is not necessary that this Court determine whether or not the jury would also have been permitted to convict him of second degree murder. The second degree murder question is discussed in this brief because if this Court adopts in dictum or otherwise petitioner's erroneous statements concerning Alabama law on this point, it might cause a great deal of confusion in other cases. The possibility of confusion is particularly likely to occur if this Court adopts petitioner's misconstruction of *Code of Alabama* 1975, §13-1-73 and cases applying it, see pp. 81-82, *infra*.

The argument on p. 75 of petitioner's brief that felony murder requires that a defendant be found to have had some basis for knowing that there was a substantial possibility that someone might be killed misconstrues Alabama law. *Ritter v. State*, 375 So.2d at 273-274, did state that under the felony murder rule culpability stems from participation in an inherently dangerous felony, one in which the defendant should have known there was a substantial possibility someone would be killed, but *Ritter* did not hold that there was a case-by-case determination of whether the defendant knew there was a substantial possibility that someone would be killed. Instead, section 13-1-70 itself makes the determination that all robberies are sufficiently dangerous to meet that criterion, and the Alabama courts have held that every homicide committed during a robbery is within the felony murder rule and all the robbers are guilty of first degree murder. *E.g.*, *Woods v. State*, 333 So.2d 178, 181 (Ala. Cr. App. 1976); *Smith v. State*, 57 Ala. App. 468, 329 So.2d 158, 159 (1976); *King v. State*, 49 Ala. App. 111, 269 So.2d 130, 134 (1972). The passage petitioner refers to from *Ritter v. State*, 375 So.2d at 374, merely explains the rationale behind the statutory and case law rule that a robber is guilty of felony murder for every homicide which occurs during the robbery.

Petitioner asserts on p. 74 of his brief that whenever a jury is instructed on first degree murder Alabama law requires it to be instructed on second degree murder also. That assertion is wrong. The cases petitioner cites merely applied *Code of Alabama* 1975, §13-1-73, or an earlier codification of it. That statutory provision applies only when the jury convicts a defendant "under an indictment for murder." The petitioner was not tried under an indictment for murder but under an indictment which charged that he committed the section 13-11-2(a)(2) capital felony of first degree murder during the course of a robbery. The Alabama Supreme Court has repeatedly held that crime cannot be referred to or treated as murder, or capital murder, or even murder under aggravated

circumstances. *E.g., Clements v. State*, 370 So.2d 723 (Ala. 1979); *Watters v. State*, 369 So.2d 1272 (Ala. 1979); *Jacobs (John L.) v. State*, 371 So.2d 448 (Ala. 1979). Therefore, the special rule of section 13-1-73 does not apply, and petitioner would not have been entitled to an instruction on second degree murder even if the Alabama capital punishment statute had not precluded lesser included offenses.

In closing, it is important to note that although the jury was precluded from convicting petitioner of any lesser included non-capital offenses, it was not precluded from determining that petitioner was guilty of only a lesser included offense or offenses. The jury was properly charged on the elements of both first degree murder and robbery (A. 7-10). Under the statute and under its instructions the jury was due to acquit petitioner of the capital offense if it determined that he was only guilty of a lesser non-capital offense. The jury's verdict evidences that it determined petitioner was guilty of the capital offense, and since the evidence which would have supported a determination that petitioner was only guilty of a lesser non-capital offense was weak, insufficient, and doubtful in credibility, see p. 61, n. 35, *supra*, it is not suprising that the jury needed only ninety minutes of deliberation to reach its verdict (R. 757).

CONCLUSION

The judgment of the Alabama Supreme Court affirming the conviction and sentence of petitioner should be affirmed.

Respectfully submitted,

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NOV 20 1979

Supreme Court, U. S.
FILED
JAN 7 1980
MICHAEL RODAK, JR., CLERK

ADDENDUM TO RESPONDENT'S BRIEF

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1979-80

1 Div. 23

Phillip Wayne Tomlin

v

State

Appeal from Mobile Circuit Court

BOOKOUT, JUDGE

Murder in the first degree wherein two or more human beings are intentionally killed, and murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire; sentence: death by electrocution.

The State's evidence was sufficient to justify appellant's conviction even though there was no eyewitness testimony concerning the double killings. It is therefore unnecessary for the purposes of this appeal to narrate a detailed account of the brutal and calculated murders contained in the voluminous record before us. Briefly, the facts are as follows:

At approximately 5:30 p.m. on January 2, 1977, at the Theodore-Dawes Exit to Interstate 10 in Mobile, nineteen-year-old Ricky Brune and fifteen-year-old Cheryl Moore were found dead in the front seat of Brune's car. Their deaths resulted from multiple gunshot wounds in the back from a sixteen-gauge shotgun and a .38 caliber pistol. The fatal shots were fired from inside the car from the rear seat. An unoccupied 1968 Ford had been spotted parked at the exit with the motor running at 4:50 p.m.

The appellant and his "partner," John Ronald Daniels, had arrived in Mobile at Randy and Danny Shanks' trailer the night before between 11:30 and 12:00 p.m. after travelling from Houston, Texas. The Shanks were the appellant's brothers-in-law. The appellant introduced Daniels as his "hit man" and told the Shanks "he had come to Mobile to get revenge ... on the guy that killed his brother ... [that] he was going to kill the person who killed his brother." The appellant's brother had been killed as a result of an accidental shotgun discharge which involved Ricky Brune on November 25, 1975.

After midnight on January 2, Randy Shanks rented a room at the Eight Days Inn for appellant and Daniels. Inside the motel room the appellant and Daniels showed the Shanks the .38 and .44 caliber pistols and a disassembled sixteen-gauge shotgun. The weapons were kept in a satchel. Later, the appellant drove the Shanks back to their trailer and asked Danny if he could use his car "the next day to get out of town." Danny told him no, that he "didn't want to get involved in it." The appellant was driving his sister's 1968 Ford.

The appellant and his "hit man" Daniels were last seen in Mobile between 3:00 and 4:00 p.m. the afternoon of the murders at the Highway 90 Lounge located two miles north of the Theodore-Dawes Exit. Outside the lounge inside his sister's car, the appellant had conversations with the Shanks brothers and James Stokes. The appellant was next seen in Houston, Texas, late that night. His sister's 1968 Ford was found abandoned at the New Orleans International Airport.

I

The appellant contends that Counts 1 and 3 of the indictment were defective and that his demurrer to those counts should have been granted. We do not agree. Omitting the formal parts, the indictment charges that the appellant, Phillip Wayne Tomlin:

> "... did unlawfully, intentionally, and with malice aforethought kill Richard Brune and Cheryl Moore by, towit: on January 2, 1977, at a location on or near Interstate 10 in Mobile County, Alabama, was shot with a gun, in violation of Act Number 213, Section 2, Sub-Section J (Act #213, §2(j)), Acts of Alabama, Regular Session, 1975, against the peace and dignity of the State of Alabama.
>
> "... did unlawfully, intentionally, and with malice aforethought kill Richard Brune and Cheryl Moore by shooting Richard Brune and Cheryl Moore with a gun, said killings were done for a pecuniary or other valuable consideration, or pursuant to a contract or for hire, in violation of Act Number 213, Section 2, Sub-Section G (Act #213, §2(g)), Acts of Alabama, Regular Session, 1975, against the peace and dignity of the State of Alabama.
>
> "... did unlawfully, intentionally, and with malice aforethought kill Richard Brune and Cheryl Moore, by shooting them with a gun, wherein both Richard Brune and Cheryl Moore were intentionally killed by PHILLIP WAYNE TOMLIN by one or a series of acts, in violation of Act Number 213, Section 2, Sub-Section J (Act #213, §2(j)) and Act Number 213, Section 6, Sub-Section H (Act #213, §6 (h)), Acts of Alabama, Regular Session, 1975, in that said killings were especially heinous, atrocious or cruel...."

Appellant pled not guilty to the charges at his arraignment on October 13, 1977. He reserved the right to file special pleas within twenty days. Appellant did not file his demurrer to the indictment until March 20, 1978, after the jury had been empaneled. We hold that appellant's indictment was not subject to demurrer, and in any event the delay in filing constituted a waiver.

Recently we reaffirmed long standing principles recognized by this court and the Alabama Supreme Court by holding the following:

> "Generally, a demurrer is the proper procedure to raise defects in an indictment. Andrews v. State, 344 So.2d 533 (Ala.Cr.App.), cert. denied, 344 So.2d 538 (Ala. 1977). Since a plea to the merits admits the validity of an indictment, a demurrer filed after arraignment and after a plea of not guilty is properly stricken. Underwood v. State, 248 Ala. 308, 27 So.2d 492 (1946). The right to file a demurrer is waived unless the demurrer is filed before a plea to the merits. Holloway v. State, 37 Ala.App. 96, 64 So.2d 115, cert. denied, 258 Ala. 558, 64 So.2d 121 (1953). If an indictment is merely voidable and subject to demurrer, the failure to demur will prevent appellate review of the indictment's short comings. Williams v. State, 333 So.2d 610 (Ala.Cr.App.), affirmed, 333 So.2d 613 (Ala. 1976)."
>
> Tommy Edwards v. State, ___ So.2d ___ (Ala.Cr.App. 1979).

Of course if an indictment is void as opposed to voidable, as where the indictment does not on its face charge an offense, or where the accused is left unaware of the nature and cause of the charge against him, this court is bound to take notice of such defect even in the absence of an objection. Edwards, supra; Davidson v. State, 351 So.2d 683 (Ala.Cr.App. 1977); Fitzgerald v. State, 53 Ala.App. 663, 303 So.2d 162 (1974). If the indictment had been void rather than voidable, the defect would have been reached by the appellant's request for an affirmative charge. Edwards, supra; Coker v. State, 18 Ala.App. 550, 93 So. 384 (1922). The defect could have been preserved by a motion in arrest of judgment. Francois v. State, 20 Ala. 83 (1852).

In the instant case, however, each count of the indictment stated an offense in such a manner as to apprise appellant of the nature of the charges against him. We hold, therefore, that the indictment was not void on its face and that the trial court was correct in overruling the untimely demurrer.

Even had the demurrer been timely filed, we hold that the faulty grammar in Count 1 was not objectionable.

> "Before an objection because of false grammar, incorrect spelling, or mere clerical errors is entertained, the court should be satisfied of the tendency of the error to mislead, or to leave in doubt the meaning of the charge to a person of common understanding, reading, not for the purpose of finding defects, but to ascertain what is intended to be charged. Grant v. State, 55 Ala. 201 (1876). Neither clerical nor grammatical errors vitiate an indictment unless they change the words or obscure the meaning, Grant, supra, or unless the error changes a word into one of different import or the sense is so obscure that one of ordinary intelligence cannot determine with certainty the meaning from the context. Sanders v. State, 2 Ala.App. 13, 56 So. 69

(1911)...."
Cook v. State, 369 So.2d 1243 (Ala.Cr.App. 1977), affirmed in part, reversed in part on other grounds, 369 So.2d 1251 (Ala. 1978).

The sense of Count 1 in the indictment is clear. The grammatical error did not obscure the sense of what was intended to be charged.

Contrary to appellant's argument that Count 1 of the indictment charges no more than the first degree murder of two persons, we hold that the requisite language of § 13-11-2(a)(10), Code of Ala. 1975, is sufficiently followed to charge a capital offense. The Alabama Supreme Court has specifically held that the capital offense expressed in § 13-11-2(a)(10) is murder aggravated by two or more individuals being killed. Ex parte Clements, 370 So.2d 723, 726 (Ala. 1979). It is thus distinguishable from traditional noncapital first degree murder.

It was proper that each count allege that the killings were done "unlawfully, intentionally, and with malice aforethought," elements of the first degree murder statute, rather than solely done intentionally. Section 13-11-2(a)(10) requires proof of (1) murder in the first degree (2) wherein two or more people are intentionally killed by the defendant. Thus first degree murder and an intentional killing must be alleged and proved under the instant statute.

Count 3 of the indictment was likewise not subject to demurrer for concluding that "said killings were especially heinous, atrocious or cruel" — language found in § 13-11-6(8). That language was mere surplusage to the first part of Count 3 which properly charged a capital offense under § 13-11-2(a)(10). As early cases have held, unnecessary averments in an indictment do not impair its validity. The most that can result from them is to hold the prosecution to the proof of them. Aaron v. State, 39 Ala. 75 (1863). Johnson v. State, 35 Ala. 363 (1860); Lindsay v. State, 19 Ala. 560 (1851). Surplusage does not vitiate an indictment otherwise good. McDaniel v. State, 20 Ala.App. 407, 102 So. 788, cert. denied, 212 Ala. 415, 102 So. 791 (1924). As long as the remaining portions of an indictment validly charge a crime, the existence of surplusage will not affect the validity of a conviction. United States v. Hyde, 448 F.2d 815 (5th Cir.), cert. denied, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1971).

II

Appellant contends that the trial court erred in failing to exclude the State's evidence relating to Count 2 of the indictment. Appellant correctly maintains that the State presented no evidence that the appellant himself committed the killings for pecuniary gain or pursuant to a contract or for hire. It is thus argued that appellant's motion to exclude the State's evidence for failure to prove a prima facie case under Count 2 of the indictment should have been granted.

In addition, the trial court at the sentence hearing specifically found that the killings were not committed for pecuniary gain and also that the appellant was not an accomplice, but was an actual participant in the murders. It is argued that the trial court's determination after the sentence hearing that the killings were not committed for pecuniary gain is in direct conflict with his denial to exclude the State's evidence as to Count 2 of the indictment at the trial. The above two contentions, while logical and persuasive, must fail. We shall address appellant's arguments separately.

A

The evidence clearly demonstrated that John Ronald Daniels, appellant's "partner," was a "hit man." Appellant had come to Mobile to get "revenge" for the death of his brother. The inference is clear that appellant's "partner" Daniels was to commit the killings pursuant to a contract or for hire. This evidence decidely falls within the parameter of a murder done for pecuniary gain or pursuant to a contract or for hire as defined in § 13-11-2(7), Code of Ala. 1975.

It does not matter that the appellant himself did not commit the murders. A jury question was

presented as to whether appellant was Daniels' accomplice. The jury was correctly charged on the law regarding accomplice participation in a crime.

Under the accomplice statute, § 13-9-1, Code of Ala. 1975:

> "The distinction between an accessory before the fact and a principal, between principals in the first and second degrees, in cases of felony, is abolished; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid or abet in its commission, though not present, must hereafter be indicted, tried and punished as principals, as in the case of misdemeanors." (Emphasis added.)

The applicability of the accomplice statute to the death penalty statute has been discussed in Colley v. State, ___ So.2d ___ (Ala.Cr.App. 1979); in a special concurrence in Ritter v. State, ___ So.2d ___ (Ala.Cr.App. 1978); and by the Alabama Supreme Court in Ritter v. State, ___ So.2d ___ (Ala. 1979). A general verdict of "guilty of murder as charged in the indictment" was returned by the jury. Conceivably the jury could have found appellant guilty under Count 2 of the indictment. We find that the accomplice statute is applicable to sustain the verdict in the instant case.

The circumstantial evidence was ample for the jury to have found that the appellant was an active participant in the murders and that he was present at the scene of the murders with a view to render aid to Daniels as it became necessary. Where the evidence presented raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion to exclude the State's evidence does not constitute error. Young v. State, 283 Ala. 676, 220 So.2d 843 (1969). Thus by way of the accomplice statute, Count 2 of the indictment was properly allowed to remain before the jury for their consideration. We do not say that the jury found the appellant guilty under Count 2, only that they properly had the option of so finding.

B

As to the second part of appellant's argument, we hold that the trial court could properly have found at the sentence hearing in considering the aggravating and mitigating circumstances that the killings were not committed for pecuniary gain and that the appellant was not an accomplice to the murders. Sections 13-11-6(6) and 13-11-7(4), Code of Ala. 1975. This is so despite the fact that the trial court had previously given the jury the option of deciding these same questions of fact by properly allowing, as we have determined, Count 2 to remain before the jury for their consideration. This seemingly anomalous result is peculiar to the death penalty statute and is explained as follows.

A basic legislative concern underlying our death penalty statute is that the sentence hearing be kept separate and apart from the trial itself and from any jury input as to the ultimate sentence to be imposed which is either death or life without parole. Section 13-11-3, Code of Ala. 1975. The sentence hearing is conducted by the trial court sitting alone and only upon a prior jury determination at the trial that the accused is guilty of a capital offense. Such a prior determination of guilt by the jury carries an automatic death sentence; the jury input stops at that point. Boiled down to its essence, the sentence hearing is designed in theory to benefit the accused by allowing the trial court to reduce his sentence from death to life without parole when the mitigating circumstances so require. The trial court in effect is allowed to act as a sentence reducer if it finds sufficient mitigating circumstances or lack of aggravating circumstances. Sections 13-11-3 and 13-11-4.

The sentence hearing is further differentiated from the trial by what evidence is allowed to be presented.

> "... In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, pro-

vided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama...." (Emphasis added.)
Section 13-11-3, Code of Ala. 1975.

By definition the trial court is to have latitude and discretion as to what matters may be presented and considered at the hearing. Specifically the trial court is not limited by the exclusionary rules of evidence it is required to adhere to during the actual trial. In short the trial court at the sentence hearing is allowed substantive and procedural flexibility which is generally prohibited during the jury trial.

Thus it is a natural consequence that the trial court having at hand not only the benefit of the facts garnered at the trial, but also the "relevant" and "probative" matters gleaned at the sentence hearing, may make findings of fact which include aggravating and mitigating circumstances which are seemingly at odds wi . the prior jury determination. Nonetheless, unless a clear abuse of discretion is shown, the trial court's findings of fact will be upheld.

In the case at bar there was sufficient evidence for Count 2 of the indictment to have remained before the jury. This was so by way of the accomplice statute. However, as previously stated, Counts 1 and 3 charged murder in the first degree wherein two or more persons were intentionally killed. The charges in Counts 1 and 3 were in no way connected with a killing for pecuniary gain, nor under those counts was there the necessity of finding that the appellant was an accomplice. Thus, if after the trial and sentence hearing the trial court independently determined that the murders were accomplished pursuant to the charges in Counts 1 and 3 and not Count 2, it was entirely within the trial court's discretion to find that the killings were not committed for pecuniary gain and that the appellant was not an accomplice. Further discussion regarding the trial court's findings of fact after the sentence hearing will be necessary later in this opinion, but for the purpose

III

Prior to trial the appellant filed a "Motion to Require District Attorney to Disclose Evidence." Side bar colloquy by the assistant district attorney regarding State evidence which he considered would be a "bomb" or "big surprise" prompted this motion. The trial court granted the motion and ordered the district attorney's office "to submit to the attorneys for the defendant a list of all witnesses which have been subpoenaed and a list of all witnesses who will be subpoenaed."

At trial the State called their "bomb," Eddie Hebison, a narcotics officer for the state of Texas. Officer Hebison's name was not included on the list of witnesses submitted by the State which included thirty-four names. Officer Hebison's testimony was basically that on March 19, 1976, he went to the "Wet and Wild Lounge" in Houston, Texas, working as cover for his partner, David Hammonds, who was to arrange a drug transaction with the appellant. While sitting at a table with his back to Agent Hammonds and appellant, he heard appellant tell Hammonds "that he would not do any larger drug transaction with him at this time because he was going to Alabama to take care of some family business and kill someone there, and that he had learned that his brother's killing had not been an accident, that it was — that he had been murdered with a sawed-off shotgun in a drug rip off deal." Appellant did sell a small quantity of marijuana and methamphetamine to Agent Hammonds at that time. In a Texas trial that resulted in a hung jury, Officer Hebison testified against appellant as to that sale in Texas.

Appellant maintains that reversible error occurred when the State called Officer Hebison whose name was not included on the list of witnesses which the court had ordered to be turned over. Appellant contends that had Hebison's name been included the Texas transcript concerning the drug case could have been obtained. Without the Texas transcript, appellant argues he was not able to effectively impeach Hebison and that his right to cross-examination was impaired. We do not agree.

While this court will not sanction disregard of a court order, we have been cited to no authority which would require the State to submit to an accused a list of all the witnesses it expects to call at the accused's trial. In Thigpen v. State, 49 Ala.App. 233, 270 So.2d 666, 671 (1972), this court stated:

> "... we do not deem the constitutional right to compulsory process in a criminal case to operate in such a manner as to compel pre-trial discovery as to who in fact are witnesses for the State. Rather, the law assumes that defense counsel will act with due diligence so as to have such witnesses as necessary available at trial. Then, by way of compulsory process for obtaining such witnesses, the defendant is secured of a proper presentation of his case at trial...."

In Dolvin v. State, 51 Ala.App. 540, 287 So.2d 250 (1973), fifteen witnesses were listed on the docket sheet at least three days before the trial. This represented two-thirds of the witnesses called by the State. This court in Dolvin, relying in part on the Thigpen decision, held that knowledge of the identity of the fifteen witnesses could have furnished the defense counsel with some indication of the remaining eight witnesses which were called. In Thigpen and Dolvin it was pointed out that the defendant had ample opportunity for a thorough and extensive cross-examination.

In the case at bar the appellant conducted a thorough and sifting cross-examination of Officer Hebison. In addition, Officer Hebison's partner, David Hammonds, was included on the witness list submitted by the State. He, too, had testified in the Texas drug case. Thus access to the Texas transcript, for whatever conceivable defense purpose it might have served, could have been obtained by notice that Hammonds was going to be called as a State witness. Furthermore, Agent Hammonds was called in the instant case and testified to substantially the same facts regarding his conversation with the appellant in the "Wet and Wild Lounge." Thus Hebison's testimony was fully corroborated by an "anticipated" witness. Therefore, the absence of Officer Hebison's name from the State's witness list was harmless at most. ARAP, Rule 45.

IV

After the jury had deliberated approximately four hours, they returned with questions for the court. From the record the following exchange occurred:

> "FOREMAN: The question — we had two questions, really. We'd like to hear a restatement of your charge, and the second question is what happens if there is a hung jury?
>
> "THE COURT: Well, I'm going to answer your first question first — I mean your second question first. Under our legal system in the event that you people cannot reach a unanimous verdict it would be incumbent upon this Court to declare a mistrial, which in effect means that approximately six to eight to twelve weeks from now another jury would be empaneled, another jury would hear the exact same evidence that you heard, would hear the exact same charge that you heard and then it would be submitted to that jury...."

The appellant contends that this charge was erroneous. No exception was taken to this charge. Appellant relies on the "plain error" rule[1] for his preservation of error. ARAP, Rule 45A.

Section 13-11-2(c), Code of Ala. 1975, states the course to be followed in the event of a mistrial in a capital felony:

> "... The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole."

Appellant asserts that the court's failure to apprise the jury of the option contained in § 13-11-2(c) was prejudicial.

Although the trial court's answer to the jury's question did not comprehensively track all the language of § 13-11-2(c), we hold that the instruction given (or lack of option apprisal) did not constitute "plain error" within the

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1. ARAP, Rule 39(k), concerning certiorari has been held applicable to the trial court's oral instructions. Ex parte Jacobs, 371 So.2d 448 (Ala. 1979).

meaning of ARAP, Rule 45A. For that rule to apply there must first be error, and it must be plainly visible in the record. Colley, supra. Here, the trial court's instruction was correct so far as it went. It did not misstate the law. That "another jury could hear the exact same evidence" and "would hear the exact same charge" in the event of a hung jury was a very real possibility and indeed a probability. We note that the trial court's response in no way curbed the jury's right to fail to decide appellant's fate. A "hung jury" could still easily have occurred.

Moreover the "option" to reindict the appellant at a later time for a noncapital offense rested entirely with the State. The "option" would at no time become the "appellant's option." It is sheer speculation whether the jury would have failed to reach a unanimous verdict had they been informed of the State's option. It is further speculation whether the appellant would have been reindicted for a noncapital offense in any event. This court will not base its opinion on speculation or surmise. Thus on this issue we are required to decide whether an omission in the trial court's instruction in response to the jury question effectively deprived appellant of his right to a fair trial free from prejudice. We do not believe that it did. Where a trial court's instruction to the jury is not as full as counsel desires, his remedy is to request written charges covering the matter omitted. Smith v. State, 262 Ala. 584, 80 So.2d 307 (1955). Here, counsel for appellant neither excepted nor requested further instructions to the jury. Accordingly, we hold the"plain error"rule inapplicable in this instance.

V

Several questions are raised concerning the trial court's order after the sentence hearing was conducted. For the sake of clarity we set forth the entire order of the court sentencing the appellant to death.

"The Court having conducted a hearing pursuant to Title (sic) 13-11-3 of the Code of Alabama, to determine whether or not the Court will sentence Mr. Phillip Wayne Tomlin to death or to life imprisonment without parole, and the Court having considered the evidence presented at the trial and at said sentencing hearings; the Court makes the following findings of fact:

"The Court first considers the aggravating circumstances as outlined and described in Title (sic) 13-11-6:

"(a) The Court finds that the Capital Felony was committed by Phillip Wayne Tomlin or that he was present at and assisted in the commission of the Capital Felony;

"(b) The Court finds no evidence that Mr. Phillip Wayne Tomlin was previously convicted of another Capital Felony. However the Court finds that the Defendant has been in and out of trouble with the police on prior occasions;

"(c) The Court finds that other than set out above in subparagraph (b), there is no evidence that the Defendant did knowingly create a great risk of death to many persons;

"(d) The Court finds the Capital Felony was committed while the Defendant was engaged in the commission of a double homicide in violation of Title (sic) 13-11-10;

"(e) The Court finds the Capital Felony was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

"(f) The Court finds the Capital Felony was not committed for pecuniary gain, within the meaning of Title (sic) 13-11-6(6) of the Code of Alabama.

"(g) The Court finds the Capital Felony was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

"(h) The Court finds that Phillip Wayne Tomlin killed or participated in the double murder of Cheryl Moore, a teenager of fifteen years of age, and Richard Brune, a teenager of nineteen years of age, at the Interstate 10 Highway Exit Ramp at Theodore-Dawes, Mobile County, Alabama.

"It is the judgment of the Court that the Capital Felony was especially heinous, atrocious, or cruel.

"The Court now considers mitigating circumstances as described and set out in Section 13-11-7, Code of Alabama.

"(a) The Court finds that Phillip Wayne Tomlin has a history of prior criminal activity;

"(b) The Court finds that the Capital Felony itself was not committed while Phillip Wayne Tomlin was under the influence of extreme mental or emotional disturbance;

"(c) The Court finds that the victims were not a participant in Phillip Wayne Tomlin's conduct, and did not consent to the act.

"(d) The Court finds that Mr. Tomlin was not an accomplice in the Capital Felony committed, but was, in fact a principal who was present and assisted in the commission of the double homicide.

"(e) The Court finds that Phillip Wayne Tomlin did not act under extreme duress or under the substantial domination of another person.

"(f) The Court finds that the capacity of Phillip Wayne Tomlin to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

"The Court having considered the aggravating circumstances and the mitigating circumstances and after weighing the aggravating and mitigating circumstances, it is the judgment of the Court that the aggravating circumstances far outweigh the mitigating circumstances and that the death penalty as fixed by the Jury should be and is hereby accepted.

"It is therefore considered and adjudged by the Court that Phillip Wayne Tomlin is guilty of the Capital Felony charged in the indictment, and specifically of intentionally killing Cheryl Moore and Richard Brune during the commission of a double murder.

"It is therefore ordered and adjudged that you, Phillip Wayne Tomlin, suffer death by electrocution at any time before the hour of sunrise on the 8th day of March, 1979, inside the walls of the William C. Holman Unit of the Prison System at Atmore, Alabama, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution.

"It is therefore further ordered and adjudged by the Court that the Warden of William C. Holman Unit of the Prison System at Atmore, or in the case of his death, disability, or absence, his Deputy, or in the event of the death, disability, or absence of both the Warden and his Deputy, the person appointed by the Commissioners of Corrections, at any time before the hour of sunrise shall on the 8th day of March, 1979, inside the walls of the William C. Holman Unit of the Prison System at Atmore, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution, cause to pass through the body of said Phillip Wayne Tomlin, a current of electricity of sufficient intensity to cause his death, and the continuance and application of such current through the body of the said Phillip Wayne Tomlin until the said Phillip Wayne Tomlin be dead, and may Almighty God have mercy on Your Soul."

It is argued that certain aggravating circumstances found by the trial court in the above order are not aggravating circumstances as defined in § 13-11-6, Code of Ala. 1975. We agree. A basic rule of review in criminal cases is that criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, i.e. defendants. Ex parte Clements, 370 So.2d 723 (Ala. 1979); Schenher v. State, 38 Ala.App. 573, 90 So.2d 234, cert. denied, 265 Ala. 700, 90 So.2d 238 (1956). Penal statutes are to reach no further in meaning than their words. Clements, supra; Fuller v. State, 257 Ala. 502, 60 So.2d 202 (1952).

The first aggravating circumstance listed by the trial court, "that the Capital Felony was committed by Phillip Wayne Tomlin or that he was present at and assisted in the commission of the Capital Felony," is not an aggravating circumstance within the meaning of § 13-11-6 and should not be listed as such. That finding is closer akin to a finding of fact as per § 13-11-4. The second sentence of the trial court's finding in paragraph (b) of the aggravating circumstances is inappropriate for the same reason. Likewise is the trial court's fourth aggravating circumstance (d) defective. That "the Capital Felony was committed while the Defendant was engaged in the commission of a double homicide in violation of Title (sic) 13-11-10," is not an aggravating circumstance within § 13-11-6. Section 13-11-10 is not contained in the Code. Also, the first part of the trial court's eighth aggravating circumstance (h), "that Phillip Wayne Tomlin killed or participated in the double murder of Cheryl Moore, a teenager of fifteen years of age, and Richard Brune, a teenager of nineteen years of age, at the Interstate 10 Highway Exit Ramp at Theodore-Dawes, Mobile County, Alabama," is not an aggravating circumstance.

The above "aggravating circumstances" are not contained in the § 13-11-6 language and should not have been included as such in the trial court's sentencing order as aggravating circumstances.

That the capital felony was especially heinous, atrocious, or cruel is an aggravating circumstance under § 13-11-6(8); however, the trial court is required to set out the basis of such a finding. See: Colley, supra; Hubbard v. State, ___ So.2d ___, (Ala.Cr.App. 1979); Johnson v. State, ___ So.2d ___, (Ala.Cr.App., May 22, 1979); Alford v. State, 307 So.2d 433, (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973).

To negate one of the mitigating circumstances, the trial court must determine whether appellant has a significant history of prior criminal activity within the meaning of Ex parte Cook, 369 So.2d 1251, 1257 (Ala. 1978). It is not sufficient that appellant had a "history of prior criminal activity" to negate the mitigating circumstance of § 13-11-7(1). Appropriate facts which substantiate this finding should be listed.

Though not raised by the appellant, we note that the trial court's order does not contain a statement of "the findings of fact from the trial" as required by § 13-11-4. The pertinent portion of § 13-11-4, Code of Ala. 1975, reads as follows:

> "... If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:
>
> "(1) One of more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and
>
> "(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances."

See Johnson, supra, for comprehensive findings of fact accompanied by aggravating and mitigating circumstances by the trial court upon the conclusion of the sentence hearing.

We have carefully searched the record for any error prejudicial to the appellant. We have applied the "plain error rule." After due consideration to the record and to the alleged errors asserted on appeal, it is our opinion that the appellant received a fair trial.

However, due to the deficiencies in the sentencing order, this cause must be remanded with directions that the trial court's order be extended to include findings of fact from the trial and sentence hearing and for a correction of aggravating and mitigating circumstances as defined by the statute and that such be transmitted to this court in answer to the instant remand.

AFFIRMED IN PART; REMANDED WITH DIRECTIONS.

Tyson and DeCarlo, JJ., concur.
Harris, P.J., and Bowen, J., concur in result only.

BOWEN, J, concurring in result.

I disagree with the holding of the majority in Part IV of its opinion.

I concur only in the result reached by the majority because, in my opinion, the plain error rule of ARAP, Rule 45A, does apply to instructions which the trial judge failed to mention to the jury. Omissions from the charge may constitute error just as may misstatements or incorrect charges. The absence of certain instructions, by their very absence, will be just as "plainly visible" as an incorrect charge.

The majority states that the plain error rule is inapplicable but then finds that the omission does not prejudice the defendant. In effect, they apply the plain error rule while denying its applicability. I would merely apply the rule.

Supreme Court, U.S.
FILED
FEB 11 1980
MICHAEL RODAK, JR., CLERK

IN THE

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v.

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I.

THE INCREASED RISK OF UNRELIABLE FACT-FINDING CREATED BY ALABAMA'S STATUTORY PRECLUSION OF LESSER-OFFENSE VERDICTS IN CAPITAL CASES IS NOT OFFSET BY THE FACTORS ON WHICH RESPONDENT RELIES AND, IN A CAPITAL CASE, THAT RISK IS CONSTITUTIONALLY INTOLERABLE UNDER THE DUE PROCESS CLAUSE.

1. The Substantial Risks Of Error Created By Alabama's Law

(a) Respondent's basic argument is that the risk of fact-finding error caused by Alabama's statutory preclusion of lesser-offense verdicts in capital cases is "speculative." R.B. 17. This argument is premised on the erroneous assumption that, in the absence of hard factual proof, this Court cannot find that preclusion of lesser-offense verdicts creates a risk of erroneous jury convictions. Since no other state has ever disallowed lesser-offense verdicts and, therefore, there is no evidence concerning any state's experience without the procedure, such a demonstration would be impossible.

More importantly, such a factual demonstration is unnecessary as a matter of law. This Court made clear in *Estelle v. Williams,* 425 U.S. 501 (1976), that the determination as to whether a particular procedure poses an "unacceptable risk" of "impermissible factors coming into play" (*id.* at 505) does not require actual proof that jury deliberations were tainted. As Chief Justice Burger explained in *Estelle*:

> "The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. [Citations omitted]. Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle and common human experience." *Id.* at 504.

Reason, principle and common human experience were applied by the Court in *Keeble v. United States,* 412 U.S. 205 (1973), to conclude that without a lesser-offense instruction there is a "substantial risk" that "[w]here one of the elements of the offense charged remains in doubt, but the

defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." 412 U.S. at 212-13.

Contrary to respondent's assertion, this risk is magnified in a capital case such as petitioner's. R.B. 30. As compared with *Keeble,* where the lesser offense was simple assault, the enormity of the relevant lesser offense of felony-murder will increase the jury's reluctance to acquit and thereby interfere with their deliberations. To make matters worse, the trial judge here instructed the jury that if the defendant is acquitted, he could not be retired for any crime he may have committed against the victim. A. 9.

(b) In order to conclude that lesser-offense verdicts create risks of error that threaten intolerable consequences in capital cases, it is unnecessary to find, as respondent suggests, that the jury intentionally will violate its oath and willfully fail to follow its instructions. R.B. 28-29. If it were, then this Court's many Due Process rulings on "impermissible influences" on jury behavior, including *Estelle,* would be unnecessary. As Justice Stewart has stated:

> "Why, if juries do not sometimes act improperly, does the Constitution require protection from inflammatory press coverage and *ex parte* influence by court officers? Cf., *e.g., Sheppard v. Maxwell,* 384 U.S. 333; *Parker v. Gladden,* 385 U.S. 363; *Turner v. Louisiana,* 379 U.S. 466. Why, if juries must be presumed to obey all instructions from the bench, does the Constitution require that certain information must not go to the jury no matter how strong a cautionary charge accompanies it? Cf. *e.g., Bruton v. United States,* 391 U.S. 123; *Jackson v. Denno,* 378 U.S. 368. Why, indeed, should we insist that no man can be constitutionally convicted by a jury from which members of an identifiable group to which he belongs have been systematically excluded?

Cf., *e.g., Hernandez v. Texas,* 347 U.S. 475." *Johnson v. Louisiana,* 406 U.S. 356, 398-99 (1972) (Stewart, J., dissenting).

The point is that there is a risk that jurors will be influenced, however subconsciously, to resolve doubts on the critical issue of intent in favor of conviction by the presence of an unnecessary distorting factor — here, the prospect of acquitting and freeing a guilty defendant due to their inability to convict of the serious, lesser offense he admittedly committed. As the Court stated in *Keeble,* the proper focus is on "the substantial risk that the jury's practice will diverge from theory." 412 U.S. at 212.

2. The Alleged Offsetting Factors

(a) Respondent argues that the risk of erroneous conviction from the preclusion of lesser-offense verdicts if offset by the fact that the jury is made aware that this is a capital case. *See* R.B. 17-21. It does not, however, make the risk acceptable in a capital case to hope that the jury's reluctance to see the death penalty imposed will compensate for another factor that unfairly and unnecessarily tilts the jury towards conviction. This argument flies in the face of the Court's consistent pronouncements that capital cases demand especially high standards of Due Process. *See* cases cited at P.B. 32-34.

In any event, respondent's so-called historical evidence for this contention is inapposite. The language respondent cites from this Court's opinions regarding jury nullification on the issue of guilt relates only to the historical experience of states with mandatory death sentences, and not to the experience of states, like Alabama, where the death penalty

was imposed on a discretionary basis. R.B. 18-19.[1] Since, under a non-mandatory statute, there is the possibility of not sentencing the defendant to death, there is less reason for jury nullification on the issue of guilt. Furthermore, given the 96% conviction rate under Alabama's law, respondent's contention regarding jury leniency is of doubtful validity.

(b) Although the jury accompanies its finding of guilt with a statement fixing the punishment at death, "the trial court and not the jury actually makes the sentencing determination." R.B. 22 n.11. Moreover, it is extremely doubtful that Alabama juries are misled — or, as respondent puts it, "encouraged" — into thinking they have actual sentencing authority and that this somehow offsets the risk of erroneous conviction. R.B. 21-22. The fact that the judge, not the jury, has sentencing authority was well publicized before trial in the Gadsden, Alabama community where petitioner's crime was committed and where he was tried. R. 944, *The Gadsden Times,* Nov. 10, 1976; R. 947, *The Gadsden Times,* Nov. 24, 1976. Accordingly, the statement in respondent's brief that "there is no indication in the record that the jury otherwise knew that the judge would ultimately determine the sentence" is erroneous. R.B. 22 n.11. In any event, the notion that the validity of Alabama's law must depend on the deception of its capital jurors underscores the inadequate, self-contradictory nature of respondent's ap-

[1]Respondent quotes Woodson v. North Carolina, 428 U.S. 280, 303 (1976), but the Court's full statement was that "[i]n view of the historical record, it is only reasonable to assume that many juries *under mandatory statutes* will continue to consider the grave consequences of conviction in reaching a verdict." R.B. 21 (Emphasis added to show omission by respondent). Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note,* 54 B.U.L. Rev. 32 (1974), on which respondent also relies, concerned only mandatory capital punishment statutes. R.B. 17-18.

proach to the fact-finding process in capital cases.

(c) Respondent stresses the availability of a mistrial as a special procedural protection which substitutes for the lesser-offense verdict. R.B. 22-25. The mistrial procedure is inapplicable. It applies where the jurors are not unanimous and disagree about whether defendant is guilty of the capital offense charged. Contrary to respondent's suggestion, a mistrial is inappropriate where the jurors are all in agreement "that the defendant was not guilty of a capital offense but was guilty of a serious non-capital offense . . . ." R.B. 24.

Respondent's belief that the jurors would invoke the "mistrial option" in order to ensure a subsequent conviction of a lesser offense on which they all agree is also unrealistic. R.B. 22-25. It presupposes that when the jurors all agree that defendant is only guilty of a lesser-included offense, (a) the jurors will falsely advise the trial judge that there is a disagreement, *i.e.*, that some jurors believe the defendant is guilty of the capital offense charged, while others vote for acquittal; and (b) the jurors will undertake this duplicitous action based on their anticipation that it will set in motion a tenuous chain of events which, even under the trial judge's instructions, may not eventuate.[2] There is no reason for the jury to have any assurance that a mistrial will lead to a reindictment and trial on a lesser-offense charge which, in turn, will result in conviction on that charge. Respondent's scenario is palpably ridiculous because it assumes a degree of sophistication and deviousness on the part of jurors that is

[2]As the trial judge instructed the jury

"[I]n the event that all of your number cannot agree upon a verdict, [a] judgment of mistrial must be entered by the Court and . . . Defendant *may* be tried again for the aggravated offense or *may* be reindicted for an offense wherein the indictment does not allege an aggravated circumstance." A. 13 (emphasis added).

illusory. It is also inconsistent with respondent's repeated assertions that jurors can be trusted to obey their oaths. R.B. 28-31.

Finally, the mistrial procedure is not a special safeguard which provides substitute protection for the preclusion of lesser-offense verdicts in capital cases. Historically, the mistrial procedure in the event of jury disagreement has existed alongside lesser-offense verdicts,[3] and is currently available in Alabama non-capital trials where the lesser-offense instruction also is allowed.[4] Moreover, contrary to respondent's statement, the trial jury in *Keeble* was instructed that it had the option, by virtue of non-unanimity, of not reaching a verdict.[5] R.B. 31.

(d) The availability of a separate sentencing hearing, relied on by respondent, does not cure the defects in the guilt-finding process created by Alabama's statute. *See* R.B. 25-28. The Court has long held that criminal defendants, particularly in capital cases, are entitled to every safeguard

[3]*E.g.*, United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Logan v. United States, 144 U.S. 263 (1892).

[4]Parham v. State, 285 Ala. 334, 231 So. 2d 899 (1970); Alford v. State, 243 Ala. 404, 10 So. 2d 373 (1942).

[5]The *Keeble* jurors were specifically instructed that none of them should "surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of verdict." Appendix, Keeble v. United States, October term, No. 72-5322, at 14. Under the federal law applicable in *Keeble*, the necessary result of a mistrial based on jury non-unanimity is that the defendant, as is the case under Alabama's law, may be retried for the offense charged in the initial trial or a lesser offense. *E.g.*, Illinois v. Somerville, 410 U.S. 458, 463 (1973); Howard v. United States, 372 F.2d 294 (9th Cir.), *cert. denied*, 388 U.S. 915 (1967). Thus, the possibility of jury disagreement was accorded no significance in this Court's ruling in *Keeble*; and the parallel instruction in this case is no more meaningful.

designed to promote reliable fact-finding at the guilt stage.[6] Indeed, respondent cites no case where the possibility of the trial judge adjusting the sentence was found by a court to compensate for the denial of Due Process at the guilt-finding stage.

In any event, whatever corrective potential may exist in Alabama's capital sentencing scheme is vastly exaggerated.[7] Without a finding of guilt on a capital charge there could be no death sentence. Moreover, respondent admits that "the same evidence which convinces the jury beyond a reasonable doubt of the defendant's guilt of the capital offense *will usually* also convince the trial court judge of the existence of at least one aggravating circumstance" sufficient to support a death sentence under Alabama's law. R.B. 57-58 (emphasis added). Respondent does not contest the fact that in the first three years of the statute's operation without the lesser-offense option, 82% of those capital defendants found guilty by a jury were sentenced to death by the trial judge.

3. The Due Process Criteria

Respondent has failed to undermine the long-standing history and virtually unanimous adoption of lesser-offense

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[6]Powell v. Alabama, 287 U.S. 45, 71 (1932); Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring), cited approvingly in Gregg v. Georgia, 428 U.S. 153, 187 (1976). *See also* Lockett v. Ohio, 438 U.S. 586, 604 (1978).

[7]The most that a guilty capital defendant can hope for is life imprisonment without a parole, a sentence which is greater than any Alabama non-capital defendant — including one guilty of first-degree murder — can receive. §13-1-74, §13-11-1, Code of Alabama (1975); §13A-6-2(c), §13A-5-30, Code of Alabama (1978).

verdicts, along with the well-reasoned protections they afford, which fully meet the standards on which this Court has traditionally relied in Due Process cases. *See* P.B. 34-50.[8] Respondent cites *Keeble, supra,* 412 U.S. at 208, to the effect that the lesser-offense doctrine was initially developed at common law to assist the prosecution. R.B. 39. But the court in *Keeble* went on to say that "it is now beyond dispute that defendant is entitled to an instruction on a lesser included offense" and that "the defendant's right to such an instruction has been recognized in numerous decisions of this Court." *Id.* at 208.

Moreover, respondent does not contest the fact that such verdicts have been deemed a vital protection to defendants, especially in capital murder cases, as far back as the nineteenth century. *McGautha v. California,* 402 U.S. 183, 198 (1971); *Stevenson v. United States,* 162 U.S. 313, 314, 315, 323 (1896); *Hopt v. Utah,* 110 U.S. 574, 582-83 (1884); *Brown v. State,* 109 Ala. 70, 77, 20 So. 103 (1896).

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[8]Respondent relies (R.B. 39-41) on Williams v. Florida, 399 U.S. 78 (1970) and Johnson v. Louisiana, 406 U.S. 356 (1972) dealing with the less-than-unanimous verdict and less than 12-man jury scheme, neither of which in these cases was applicable to capital juries. This Court, in upholding six-man juries, specifically relied on the fact that the use of 12-man juries (which petitioner there asserted was the constitutional norm) was no more than a "historical accident" based "on little more than mystical or superstitious insights into the significance of '12'," that at least nine states had juries of fewer than 12 for criminal cases, and that the "reliability of the jury as a fact-finder hardly seems likely to be a function of its size." 399 U.S. at 88-90, 98-99 n.45, 100-01. In Johnson v. Louisiana, *supra,* 406 U.S. at 359-63; *see also id.* at 368, 372, 377 (Powell, J., concurring), the Court concluded that non-unanimous guilty verdicts did not undermine the beyond-reasonable-doubt standard; that prior decisions of the Court had refused to invalidate non-unanimous jury verdicts, and that unanimity had been abandoned in England (United Kingdom Criminal Justice Act of 1967, §13) and criticized by the commentators.

In the last analysis, it makes no difference that the lesser-offense option may assist prosecutors who, as representatives of the people and officers of the court, have an interest identical to defendants in precise, accurate jury fact-finding untainted by impermissible influences and substantial risks of error.[9]

Much is made of the fact that this Court has never ruled on the constitutional question presented by this case. R.B. 33-37. As Justice Harlan stated on the occasion of this Court's ruling on the reasonable doubt standard, it is "only because of the nearly complete and long-standing acceptance" of that procedure "by the States in criminal trials that the Court has not before today had to hold explicitly that due process as an expression of fundamental procedural fairness," requires it. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

Respondent also fails to demonstrate, as it must, that eliminating the procedure by statute for capital defendants would provide significant countervailing public benefits (*In re Winship, supra*, 397 U.S. at 366), and that the risks of fact-finding error caused by Alabama's procedure cannot "be avoided." *Estelle v. Williams, supra*, 425 U.S. at 505. Those risks are easily avoided by preserving the availability of lesser-offense verdicts without compromising Alabama's goal of having an adequate, constitutionally acceptable system for the imposition of capital punishment. Respondent

[9]Respondent's further suggestion (R.B. 34-35) that the three dissenting Justices in *Keeble* implicitly took a position "contrary to petitioner's position in the present case" is a misreading of Justice Stewart's dissent, which merely noted that if a particular lesser-offense is not a federal crime, a finding of guilt for such a crime in a federal court would be contrary to the rule that a federal criminal court's "limited jurisdiction" extends only to statutory crimes as defined by Congressional enactments. 412 U.S. at 215-17

concedes that the elimination of lesser-offense verdicts is unnecessary to meet the constitutional requirements set forth in *Furman v. Georgia*, 408 U.S. 238 (1972). R.B. 45. As shown in the next two Points, respondent's alleged goal of exceeding constitutional requirements is illusory and is actually contrary to this Court's post-*Furman* decisions.

II.

RESPONDENT HAS FAILED TO SHOW WHY ALABAMA'S LAW SHOULD NOT BE INVALIDATED PURSUANT TO THIS COURT'S EIGHTH AMENDMENT RULINGS IN GREGG v. GEORGIA, WOODSON v. NORTH CAROLINA AND LOCKETT v. OHIO.

1. The Need To Focus On The Particular Circumstances Of The Capital Crime Charged

The basis of respondent's Eighth Amendment argument is that the statutory preclusion of lesser-offense verdicts follows the alleged goal of *Furman* to eliminate discretion. R.B. 55. The flaw in this argument is its failure (*see* R.B. 55) to deal with the principle enunciated by this Court in *Woodson v. North Carolina, supra*, 428 U.S. at 304-05, and reiterated in *Lockett v. Ohio, supra*, 438 U.S. at 604, that the "fundamental respect for humanity underlying the Eighth Amendment" and the "corresponding difference in the need for reliability" in capital cases makes consideration "of the circumstances of the particular offense" a constitutional requirement.

Applying this principle, the Court held in *Woodson* that the sentencing authority's decisions in a capital case must

have room for discretion based on standards similar to those employed at the guilt-finding stage to assist the jury in its fact-evaluation process. *Woodson v. North Carolina, supra*, 428 U.S. at 304-05.[10] The Court in *Woodson* said that discretion is inevitable and rather than attempt to eliminate it, there should be "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." 428 U.S. at 303. Lesser-included offense instructions allow the jury to conform its verdict to the offense actually committed; absent that procedure, capriciousness is likely to result from the irrational choice of either acquittal of a defendant guilty of a serious offense, or conviction of an offense which the defendant did not commit. By unduly limiting fact-finding discetion in capital cases and eliminating a long-established standard for guiding its exercise, Alabama's law has the same defect as the statutes invalidated in *Woodson* and *Lockett*.[11]

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[10]*Accord*, Gregg v. Georgia, *supra*, 428 U.S. at 193 (noting that it "would be virtually unthinkable to follow any other course in a legal system" than to give juries "careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. . . . It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations."). Lesser-included offenses are an historically sanctioned means for arriving at a careful, precise judgment on the key issue in a capital case.

[11]Contrary to respondent's contention, there is no support in Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976) for abolition of lesser-offense verdicts. R.B. 46. *Roberts*, which dealt with Louisiana's mandatory death sentence law, did not condemn the practice of allowing juries to return lesser-offense verdicts. *Roberts* merely said that by requiring instructions to juries permitting them to return lesser-offense verdicts in capital cases, even where "there is not a scintilla of evidence to support the lesser verdicts," Louisiana's law had precisely the same defect of standard-less jury decision-making on the life-death question (given Louisiana's mandatory sentence following a finding of guilt on a

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2. Eliminating Lesser-Offense Verdicts As An Element Of A "Totally Alien" And "Unconstitutional" System Of Criminal Justice

Contrary to respondent's contention (R.B. 36), this Court clearly stated in *Gregg v. Georgia, supra*, 428 U.S. at 199-200 n.50 (1976), that a system for the imposition of capital punishment, which, among other things, abolished the lesser-offense option, would be unconstitutional. The Court dealt in turn with each of the four "opportunities for discretionary action" alleged as defects in Georgia's capital punishment process (*i.e.*, prosecutorial discretion as to what crime to charge, plea bargaining, lesser-offense verdicts, and post-sentence executive commutation). *Id.* at 199. Plainly the Court's reference (428 U.S. at 199-200 n.50) to discretion at the trial stage where a "jury refuse[s] to convict even though the evidence supported the charge" related to the availability under Georgia's law of lesser-offense verdicts. The Court made clear that a "system" which eliminated the four opportunities for discretion, including lesser-offense verdicts, "would be totally alien to our notions of criminal justice" and "would be unconstitutional." *Ibid.*[12]

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capital charge) as its pre-*Furman* law, which permitted juries, without standards, to return a verdict of "guilty without capital punishment in any murder case." 428 U.S. at 334. Unlike Louisiana, Alabama's standard for lesser-offense verdicts in non-capital cases, which is all petitioner asserts should aply, limits lesser-offense instructions to cases where there is at least some evidence supporting a lesser-offense verdict. Moreover, Alabama's death sentence provision is not mandatory.

[12]In an attempt to support the validity of Alabama's law under the Eighth Amendment, respondent argues that the law "limits the definition of capital offenses to a group of narrowly defined types of aggravated murder." R.B. 65. As explained in petitioner's main brief (P.B. 58-59), the offenses are *not* narrowly defined, but, due to the breadth of the aider

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Accordingly, Alabama's law, which represents the first step toward such a system of justice, must be held to be a constitutionally intolerable response to this Court's decision in *Furman.*

III.

RESPONDENT'S EQUAL PROTECTION ARGUMENTS FAIL TO PROVIDE A SUFFICIENT BASIS FOR SUSTAINING THE HARMFUL DISCRIMINATION AGAINST CAPITAL DEFENDANTS IN ALABAMA'S LAW.

1. Petitioner's Equal Protection Claim Is Properly Before This Court

Respondent concedes that in the state courts, at both the trial (A. 55; R. 39-45, 105) and appellate (A. 38-40) levels, petitioner timely raised federal constitutional objections under the Fourteenth Amendment to Alabama's preclusion of lesser-offense verdicts.[13] Nevertheless, respondent now

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and abettor and conspiracy doctrines, as set forth in the trial judge's instructions to the jury, to which petitioner objected (A. 5; R. 747-751), are so loosely defined that Alabama's law creates an undue risk, heightened by the absence of the lesser-offense option, that many capital defendants, such as petitioner, will receive a disproportionately heavy sentence, whereby they are sentenced to death even where they lacked any intent that the victim be killed.

[13]There is no question that the Alabama Supreme Court considered petitioner's federal constitutional claims in this case. As respondent concedes, petitioner's application to the Alabama Supreme Court specifically relied on the "14th Amendment." R.B. 43. Moreover, in its

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argues that petitioner's failure to use the phrase "equal protection" is fatal to its equal protection arguments to this Court. This argument has no support in the case-law and is contradicted by this Court's holding in *Stanley v. Illinois, 405 U.S. 645 (1972).*

In Stanley, supra, 405 U.S. at 658 n.10, the Court held that it would consider petitioner's argument that Illinois' law precluding illegitimate fathers but not mothers from receiving a hearing on parental custody claim violated both the Equal Protection Clause and the Due Process Clause, even though petitioner argued only the Equal Protection point in the state courts. Because petitioner's Equal Protection argument is related to its Due Process and Cruel and Unusual Punishment arguments, as respondent concedes (R.B. 53),[14] this Court's ruling in *Stanley,* where petitioner's Due Process and Equal Protection arguments were also related, is dispositive. *Accord, Anderson v. United States,* 417 U.S. 211, 223 n.12 (1974).[15]

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decision in this case, the Alabama Supreme Court dealt with the federal constitutional issue, holding that the law is "constitutional" (A. 53) on the authority of Jacobs v. State, 361 So. 2d 640 (Ala. 1978), *cert. denied,* 439 U.S. 1122 (1979), a case which involved only federal constitutional claims and dealt with the lesser-offense issue. Furthermore, the Equal Protection question was asserted in petitioner's application for a writ of certiorari in this Court.

[14]Due Process and Equal Protection are interrelated. *See* Mayer v. City of Cicago, 404 U.S. 189 (1971) (holding procedural deprivation to violate both Due Process and Equal Protection), Weinberger v. Weisenfeld, 420 U.S. 636 (1975) (Equal Protection secured by Due Process clause of the Fifth Amendment).

[15]The cases on which respondent relies are inapposite. R.B. 43-44. In Fuller v. Oregon, 417 U.S. 40 (1974), the issue was whether Oregon's criminal defendant cost recoupment statute violated the equal protection clause because it discriminated in favor of those found innocent and

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It is clear that petitioner's explicit objections to the constitutionality of the preclusion of lesser-offense verdicts at the trial and appellate levels on the Fourteenth Amendment ground is sufficient to enable this Court to consider petitioner's equal protection argument.

2. The "Strict Scrutiny" Test

Respondent does not even attempt to argue that Alabama's death penalty statute could conceivably survive "strict scrutiny" under the Equal Protection Clause. Instead, respondent argues that "strict scrutiny" is appropriate only where the statutory discrimination in question violates a constitutional safeguard other than the Equal Protection Clause. R.B. 52-53. If respondent were correct, applying the Equal Protection Clause pursuant to the "strict scrutiny" test would be superfluous. Rather, in *San Antonio School District v. Rodriguez,* 411 U.S 1, 38 (1973), the Court held that strict scrutiny was appropriate where a statutory classification had the effect of "*touching upon*

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against those who were found guilty. Petitioner, for the first time, raised the entirely unrelated question in this Court as to whether the statute's imposition of an obligation to repay without sifficient notice or hearing violated due process. *Id.* at 50 n.11. Unlike *Fuller,* where petitioner attacked an aspect of the Oregon law's operation which had never been considered below, petitioner has consistently objected on federal-law grounds to the lesser-offense provision in Alabama's death penalty law on Fourteenth Amendment (as well as Eighth Amendment) grounds that are all interrelated. P.B. 13-14. In Street v. New York, 394 U.S. 576, 681-85 (1969), the Court held that raising the constitutionality of the statute was sufficient, and no particular form of words or phrases was essential, *id.* at 584, so that petitioner could attack New York's anti-flag defacement statute on the "over-breadth" theory even though he did not originally raise that theory in the state courts.

constitutionally protected rights." (Emphasis added.)[16] In order to apply strict scrutiny under the Equal Protection Clause, the Court need not hold that Alabama's law violates any other constitutional provision.

There is no question that Alabama's law has the requisite effect of "touching upon constitutionally protected rights" to a fair trial. Respondent concedes that the beyond-the-reasonable-doubt standard and the right to fair fact-finding are fundamental rights to be accored strict scrutiny, and simply denies that they are adversely affected by the preclusion of lesser-offense instructions. *See* R.B. 53. In *Estelle v. Williams, supra,* 425 U.S. at 503-05, the Court held that criminal defendants have "fundamental rights" in the "fairness of the fact-finding process" and a right to have a jury decide guilt or innocence without "an unacceptable risk . . . of impermissible factors coming into play." Alabama's law creates the risk that jury deliberations will be unfairly influenced to resolve doubts on the critical elements infavor of conviction by the specter of total freedom for capital defendants who are plainly guilty of only a serious intermediate crime. *See Keeble, supra,* 412 U.S. 205. This

[16] *Accord,* Police Dept. of Chicago v. Mosley, 408 U.S. 92, 98, 101 (1972) (applying strict scrutiny to regulation of picketing on the ground that the statute was one "affecting First Amendment interests" even though the regulation was not invalid under the First Amendment); Bullock v. Carter, 405 U.S. 134, 143 (1972) (applying strict scrutiny to Texas laws requiring filing fees for candidates in election primaries even though there was no substantive violation of any constitutional right to vote or stand as a candidate for public office); Shapiro v. Thompson, 394 U.S. 618 (1969) (applying strict scrutiny to statute which burdened the right to travel, even though there was no substantive violation found of that constitutional right); Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978) (applying strict scrutiny to statute affecting plaintiff's ability to marry in Wisconsin, without finding any substantive constitutional violation).

risk is unacceptable at least for capital defendants. The strict scrutiny test is particularly appropriate in dealing with fair trial rights in capital cases because, due to the uniqueness and severity of the death penalty, capital defendants have a constitutionally recognized right to procedures aimed at ensuring "a greater degree of reliability" than in non-capital cases. *Lockett v. Ohio, supra,* 438 U.S. at 605; *Gregg v. Georgia, supra,* 428 U.S. at 187; *Woodson v. North Carolina, supra,* 428 U.S. at 305.

Accordingly, the strict scrutiny test under the Equal Protection Clause is applicable here and respondent has failed to show that the statutory preclusion of lesser-offense verdicts is necessitated by a compelling state interest.

3. The Lenient Standard

Even if this Court, as respondent suggest, applies the lenient equal protection standard set forth in *McGinnis v. Royster,* 410 U.S. 263, 270 (1973), Alabama's decision to discriminate against capital defendants by denying them opportunity to receive a lesser-offense verdict must be invalidated because it lacks "some rational basis" related to a valid, "legitimate, articulated state purpose" to sustain it. As shown herein, Alabama's purpose was not valid; and the statute is not rationally related to any legitimate aim.

Respondent's argument (R.B. 45-51) that the abolition of lesser-offense verdicts will enable Alabama "to do even better" (R.B. 45) than what it perceived (erroneously) *Furman* to require is unavailing.[17] The Court made clear in

[17]This Court is not required to "accept at face value" respondent's assertion of legislative purpose. Weinberger v. Wiesenfeld, *supra,* 420 U.S. at 648 n.16. *Accord,* Eisenstadt v. Baird, 405 U.S. 438, 451 (1972); U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 536-37

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Woodson v. North Carolina, supra, 428 U.S. at 303, that the abolition of fact-finding discretion, rather than the imposition of standards to control it, was unconstitutional in a capital case. *See* Point II, *supra.*

AS held in *Jurek v. Texas,* 428 U.S. 262, 274 (1976), the contention that *Furman* endorsed abolition of jury consideration of lesser-offenses, "fundamentally misinterprets the *Furman* decision, and we reject it for the reasons set out in our opinion today in *Gregg v. Georgia, ante,* at 199." *Accord, Proffitt v. Florida,* 428 U.S. 242, 254 (1976). Moreover, the Court stated in *Gregg, supra:*

> "*Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." 428 U.S. at 199.

Accordingly, it is clear that Alabama's decision to abolish an instruction to the jury which enables it to "focus on the particularized circumstances of the crime" is not supported by a valid and legitimate purpose, but rather is a misreading

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(1973). It is logical to conclude, as the Court did in *Lockett* in reviewing the erroneous and unconstitutional responses to *Furman* of North Carolina and Louisiana, that Alabama was merely seeking to comply with what it regarded as *Furman's* mandate, and that Alabama misunderstood the decision. *Lockett v. Ohio, supra,* 438 U.S. at 597-602. For respondent now to hypothesize, without a scintilla of supporting evidence based on legislative history or any other sources, that a purpose of the law was "to do even better" than *Furman* required is simply an exercise of lawyers' imagination which must be viewed with great skepticism. R.B. 45. *E.g.,* Trimble v. Gordon, 430 U.S. 762, 774-76 (1977); Craig v. Boren, 429 U.S. 190, 199-200 n.7 (1976). As this Court made clear in McGinnis v. Royster, *supra,* 410 U.S. at 277, a statute which has only an "imaginary basis" and lacks "a clear and legitimate purpose" will not survive Equal Protection scrutiny even where strict scrutiny is not applicable.

of *Furman. See Lockett v. Ohio, supra,* 438 U.S. at 599-600.

Moreover, on its face, the abolition of lesser-offense verdicts is not a rational means of preventing arbitrariness and capriciousness in capital cases. To the contrary, Alabama's law creates arbitrariness and capriciousness by placing jurors, in capital cases only, in the unfair position of having either to acquit and free a defendant guilty of a serious intermediate offense, or to convict of a capital crime, but not convict of the precise offense committed.

The invalidity of the distinctions drawn by the Alabama law is further illustrated by the fact that only Alabama, of the more than 30 states that have capital punishment laws, precludes lesser-offense verdicts. The experience of other states is a well-established means of judging whether one state's decision to discriminate against a defined group is deemed to have a sufficient basis to satisfy the Equal Protection Clause.[18] *E.g., Stanton v. Stanton,* 421 U.S. 7, 15 (1975).

[18]The rationality of Alabama's classification is further undercut by the fact that in most other respects relating to decision-making on the issue of guilt, Alabama capital defendants and non-capital defendants are treated alike. Thus, both groups are entitled to a unanimous jury verdict (*see, e.g.,* Kirk v. State, 247 Ala. 43, 22 So. 2d 431 (1945)), both are tried pursuant to the same rules of evidence at the guilt-finding stage (§12-21-200 through §12-21-263, Code of Alabama (1975)), and both are eligible for sentencing commutation by state executives (Amendment No 38, Constitution of Alabama (1901); §15-18-100, §15-22-27, §15-22-36, Code of Alabama (1975)). This fact underscores the likelihood — unrebutted by anything presented in respondent's brief — that Alabama perceives no genuinely serious need to treat capital and non-capital defendants differently with respect to well-established procedural protections. On the other hand, if respondent's Equal Protection argument is correct, it would be equally justifiable for Alabama to institute non-unanimous juries for capital cases alone in order to prevent jury nullification or to abolish the Governor's clemency power in capital cases alone so as to promote consistency in sentencing outcomes.

Moreover, in *Lockett v. Ohio, supra,* 438 U.S. at 605, the Court, in striking down a provision precluding the sentencing authority in capital cases from weighing all the circumstances of the offense, concluded that

> "[t]he considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases."

Similarly, here the considerations that led to universal acceptance of allowing convictions of lesser offenses by all states, including Alabama, are just as important in capital cases, and no invidious discrimination against capital defendants is allowed. Respondent does not point to even a shred of evidence or to language in any of the Court's opinions which supports the distinctions they have drawn.

The absence of any reasoned basis for distinguishing between capital and non-capital defendants with respect to risks of error avoided by lesser-offense verdicts means that the statute is invalid under the Equal Protection Clause. *Mayer v. City of Chicago,* 404 U.S. 189 (1971); *Baxstrom v. Herold,* 383 U.S. 107 (1966); *Jackson v. Indiana,* 406 U.S. 715 (1972); *Humphrey v. Cady* 405 U.S. 504 (1972); *see also Groppi v. Wisconsin,* 400 U.S. 505 (1971) (no distinction allowed between felony and non-felony defendants with regard to change of venue).[19] Significantly,

[19]Respondent critizes petitioner's Equal Protection argument as overlapping its Due Process point. R.B. 51-52. While the Court may find Alabama's law unconstitutional on Equal Protection grounds without also finding a Due Process violation, the fact is that these concepts are interrelated and the Court has in the past found discriminatory deprivations of procedural safeguards to violate Due Process as well as Equal Protection. *See* Mayer, *supra,* 404 U.S. 189, 193.

respondent does not even attempt to distinguish this Court's Equal Protection rulings involving procedural safeguards (set forth at P.B. 65-67), all of which are compelling precedents for a decision that Alabama's law violates the Equal Protection Clause no matter what standard of review is applied. Equal Protection plainly calls for criminal procedures which allow no invidious distinctions between capital and non-capital defendants, particularly where the capital defendant is deprived of an historically important safeguard available to all other defendants. *See Mayer, supra,* 404 U.S. at 195-96.

IV.

RESPONDENT CONCEDES THAT THE EVIDENCE SUPPORTED A VERDICT OF GUILT ON A LESSER-INCLUDED NON-CAPITAL OFFENSE.

Respondent has conceded that "if it had not been for the preclusion clause in Alabama's [death penalty] statute, lesser included offense instructions would have been given" (R.B. 78) to the jury at petitioner's trial on the issue of guilt. Specifically, respondent stated that because petitioner denied that he killed the victim of the robbery, and also denied that he in any way facilitated that killing, there was enough evidence "to have supported lesser included non-capital offense instructions for the crimes of first degree murder and robbery had such instructions not been precluded by the statute." R.B. 79. These concessions answer an important part of the question posed by the Court on the grant of certiorari. A. 63.

CONCLUSION

For the reasons stated here and in our main brief, the judgment of the Supreme Court of Alabama affirming petitioner's conviction and sentence of death should be reversed.

Respectfully submitted,

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